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CIVIL PROCEDURE

BEFORE

JUSTICES OF THE PEACE

[OKLAHOMA PRACTICE]

BY

JUDGE ROBERT A. NEFF

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CIVIL PROCEDURE

BEFORE

JUSTICES OF THE PEACE.

CHAPTER I.

JURISDICTIONS

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(1.) The jurisdiction of a justice of the peace in civil actions shall be coextensive with the county wherein he may have been elected, and wherein he shall reside: Provided, that in all actions against two or more defendants jointly or jointly and severally liable, and who live in adjoining counties, such actions may be brought before any justice of the peace of the county wherein either of the defendants shall reside or may be summoned; and such justice shall have power and is authorized to issue a summons directed to the sheriff of any other county for service to bring in all co-defendants who may be served in such county; and upon service of such summons the justice before whom the action is pending shall have as full jurisdiction as to all the defendants as he would have in cases where all the defendants resided in the county where the action is brought.

(2.) Justices of the peace have original jurisdictions of civil actions for the recovery of money only, and to try and

determine the same, where the amount claimed does not exceed one hundred dollars.

Second: To try the action for the forcible entry and detention, or detention only, of real property.

Third: To issue orders of attachment and proceed against the goods and effects of debtors in certain cases.

Fourth: To issue subpoenas for witnesses, and compel their attendance in causes and matters pending before them, or other cause or matter wherein they may be required to take depositions.

Fifth: To issue execution on judgments issued by them.

Sixth: To proceed against security for costs and bail for the stay of execution before the justice in the manner prescribed by law.

Seventh: To proceed against constable failing to make returns, making false return, or failing to pay over money collected on execution issued by such justice.

Eighth: To administer any oath or affirmation authorized or required by law to be administered.

Ninth: To take the acknowledgement of deeds, mortgages, and other instruments in writing.

Tenth: To solemnize marriages.

(3.) When the balance claimed to be due on any open or unsettled account, or on any bill, note or bond, does not exceed one hundred dollars, the justice of the peace has jurisdiction to hear and determine the matters in controversy, without regard to the amount of the original account or he may render judgment for any balance found due, not exceeding one hundred dollars.

(4.) Justices shall have jurisdiction in actions for trespass on real estate, where damages demanded for such trespass do not exceed one hundred dollars.

(5) If in any action commenced before a justice it appears to the satisfaction of the justice that the title or boundaries of the land is the question in dispute in such action, said action must be stayed before said justice, and said justice must, within ten days thereafter, certify said case, and transmit all papers and process therein to the clerk of the district court of his county, and said case will be docketed and thereafter proceeded with in the district court as if originally commenced therein. The justice before whom said action is commenced shall require of the defendant setting up said title or boundary to set forth in his answer or bill of particulars a full and specific statement of the facts constituting his defense of said title or boundary brought in question; and the defendant shall be required to make affidavit of the truthfulness of the statements in his said answer or bill of particulars contained, and that said defense is bona fide and not made for vexation or delay, but for the promotion of justice.

(6.) Justices shall not have jurisdiction of any action: First to recover damages for an assault or an assault and battery; or, second: in any action for slander or malicious prosecution; or, third, in actions on contracts for real estate; or,

fourth, in actions in which the title to real estate is sought to be recovered, or may be drawn in question.

(7.) Every justice of the peace must keep a book denominated a docket, which shall be furnished by the proper township, in which must be entered by him, the proper title of every action in which the writ is served, or when the parties voluntarily appear; the date of the writ; the time of its return; and if an order to attach property was made, such fact must be stated, together with the affidavit upon which such order was made; the filing of the bill of particulars of either party; which of the parties, if either of them, appear at the trial; every adjournment, stating upon whose application, whether on oath or consent, and to what time. When trial by jury is demanded, the demand must be stated, and by whom made, and by whom the deposit of three dollars as jury fees was made; the names of the jurors selected, and the time appointed for the trial; the names of the jurors who appear, and those sworn; the names of all witnesses sworn and at whose request; the exceptions to the rulings of the justice on questions of law, taken by either party; the verdict of the jury, and when received. If the jury disagree, and are discharged, the fact must be stated. The judgment of the justice, specifying the items of costs included, and the time when rendered; the issue of the execution, and orders to sell, when issued, and to whom the renewals thereof, if any were made; the return and when made; and a statement of any money paid to the justice, and by whom; the giving of a transcript, to be filed in the clerk's office, and when given; if appeal be taken, the undertaking, and the time of entering the same, and by which party taken; the satisfaction of the judgment, and the time of satisfying the same.

(8.) The several particulars in the last section specified, must be entered under the title of the action to which they relate, and at the time when they occurred, except that the bill of exceptions in regard to the ruling and questions of law or evidence need not be entered until after the judgment unless required by the justices, or one of the parties. Such entries in a justice's docket, or a transcript thereof, certified by the justice or his successor in office, shall be evidence to prove the facts stated therein.

(9.) Each justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name. He shall number the cases progressively upon his docket, and shall correspondingly number the papers in each case. He shall keep the entire papers in each action together, and in packages of a proper and convenient size, and in the order in which the cases are numbered in his docket.

(10.) It is the duty of every justice, upon the expiration of his term of office, to deposit with his successor his official docket, as well as his own as of his predecessors, which may be in his custody, together with all files and papers, laws and statutes pertaining to his office, there to be kept as public records and property. If there be no successor elected and qualified, or if the office becomes vacant by death, removal from

the township, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited with the nearest justice in the township, if there be any; and if there be none, then with the nearest in the county, there to be kept until a successor shall be chosen and qualified, then to be delivered over to such successor, on request.

(11.) A justice receiving by succession or on deposit any such docket, papers and laws, shall, if requested give a receipt therefore to the person from whom he receives the same.

(12.) The justice with whom the docket of another may be deposited, either during a vacancy or as his successor, is authorized, while having such docket legally in his possesion, to issue execution on any judgment there entered and unsatisfied, and not docketed in the district court, in the same manner and with the same effect as the justice by whom the judgment was rendered might have done, to take bail in appeal, to issue certified transcripts of judgments on such docket, and proceed in all cases in like manner as if the same had been originally had or instituted before him.

(13.) When two or more justices are equally entitled to be deemed the successor of a justice, the county commissioners shall designate which justice is to be deemed the successor of the justice going out of office, or whose office has become vacant, and shall enter a certificate in the last docket of the justice going out of office, or whose office is vacant, of their determination, before the same is delivered to such successor.

(14.) In case of sickness or other disability, or necessary absence of a justice at the time appointed for trial, another justice of the same township may, at his request, attend in his behalf, and shall thereupon, become vested wit hthe power, for the time being, of the justice before whom the summons was returnable. In that case the proper entry of the proceeding before the attending justice, subscribed by him, must be made in the docket of the justice before whom the writ was returnable. If the case be adjourned, the justice before whom the writ was returnable, must resume jurisdiction.

(15.) The summons, execution, and every other paper made or issued by a justice, must be filled up, without a blank to be filled by another; otherwise it is void.

(16.) A justice, at the request of a party, and on being satisfied that it is expedient, may specially depute any discreet person of suitable age, and not interested in the action, to serve a summons or execution, or attach property. The person so deputed has the authority of constable in relation to the service, execution and return of such process, and is subject to the same obligations; but there can be no fee for his services taxed in the bill of costs.

(17.) The justice may punish, as for a contempt, persons guilty of the following acts: Disorderly, contemptuous or insolent behavior toward the justice, tending to interrupt the due course of a trial or other judicial proceeding; wilful resistence, in the presence of the justice, to the execution of a lawful order or process made or issued by him.

(18.) A warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice, when an opportunity to be heard in his defense or excuse must be given. The justice may thereupon discharge him, or may convict him of the offense, and adjudge a punishment by fine or imprisonment, or both; such fine not to exceed twenty dollars, and such imprisonment not to exceed ten days.

(19.) The conviction, specifying particularly the offense and the judgment thereon, must be entered on his docket; a warrant of commitment to the jail of the county, until the fine is paid, or for the term of imprisonment, may then be issued. Such warrant of commitment must contain a transcript of the entry in the docket, and the same must be executed by any constable to whom it may be given, and by the jailor of the county.

(20.) Attorneys at law, duly admitted to practice as such, may appear for and represent any party before a justice, to the same extent and with the same effect as in the district court. When an attorney appears for a party, the justice shall note the fact of such appearance on his docket in the case in which the attorney appears, which shall have the same effect as an appearance of record in the district court.

(21.) All processes out of a justice court may be directed to the sheriff of the county, in the discretion of the justice, and be by the sheriff served and returned in the same manner as provided for in cases where the same is issued to the constable.

(22.) It shall be unlawful for any justice of the peace to purchase any judgment upon any docket in his possession; and for so doing, for every such offense, such justice shall forfeit and pay a sum of not more than fifty dollars, nor less than ten dollars, to be recovered by any court having jurisdiction thereof, and when collected, shall be paid into the treasury of the county where such offense was committed.

CHAPTER II.

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39. Subpoenas, and defaulting witness.

(23.) In all cases before a justice of the peace, the plaintiff, his attorney or agent, shall file with such justice a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of particulars he may claim as a setoff; and the evidence on the trial shall be confined to the items set forth in said bill.

(24.) The bill of particulars of the plaintiff must be filed at the time the action is commenced, and that of the defendant must be filed at or before the hour named in the summons for the appearance of the defendant, unless further time be given by the justice, for good cause shown. The bill of particulars must state, in a plain and direct manner, the facts constituting the cause of action or the claim to be set off, and in case either party should file a motion to require the other party to make his bill or particulars more definite and certain, or to more specifically state his cause of action or defense, the justice will proceed to hear the motion, and if the grounds therein are good, he should sustain the motion and require the opposite party to comply therewith.

(25.) The bill of particulars may be amended at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omission in the items, when, by such amendment, substantial justice will be promoted. If the amendment be made at the time of or during the trial, and it be made to appear to the satisfaction of the justice, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment must be granted. The justice may also, in his discretion, require, as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the justice; but such payment cannot be required unless an adjournment is made necessary by the amendment.

(26.) A minor or infant in law can only sue or defend through the mediumship of a guardian, who must be appointed as follows:

First: If the infant be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some friend. The consent, in writing, of the guardian to be appointed, and to be responsible for the costs if he fail in the action, must be filed with the justice.

Second: If the infant be defendant, the guardian must be appointed before the trial. It is the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the propoeed guardian be present and consent, in writing, to be appointed; otherwise the justice may appoint any suitable person who gives such consent.

(27.) When a person who is a non-resident of the county in which the action is brought files an action before a justice of the peace, the justice of the peace must, before the issuing of process, require the plaintiff to give security for the costs of the suit, which may be done by depositing a sum of money deemed by the justice to be sufficient to discharge the costs which may accrue on the action, or by giving an undertaking, with surety approved by the justice, payable to the adverse party, for the payment of all costs that may accrue in the action. Where the party bringing the action is a resident of the county wherein the suit is brought, the requiring of a deposit or bond for costs is discretionary with the justice. But where the defendant files a motion asking that the plaintiff be required to furnish bond or security for costs, we think as a matter of justice and protection not only to the court but to the defendant as well, the justice should carefully consider the motion.

(28.) Where security for costs is required, after the action has been commenced, and the order be not complied with, the justice may dismiss the action at the cost of the plaintiff.

(29.) If any plaintiff or plaintiffs, after commencing an action before a justice, in the county in which he or they reside, remove out of the county, the justice may require such plaintiff or plaintiffs to deposit a sum equal to the costs that have accrued, and that will probably accrue; or require, in place thereof, that such party give sufficient surety for all costs which have accrued, or which may accrue in the action; and in default to do either, shall dismiss the action.

(30.) Actions before justices of the peace are commenced by summons, or by appearance and agreement of the parties without summons. In the former, the action is deemed commenced upon delivery of the writ to the constable to be served, and he shall note thereon the time of receiving the same. In the latter case, the action is deemed commenced at the time of docketing the case.

(31.) The summons shall be dated the day it is issued, signed by the justice issuing the same, directed to a constable of the proper township (except in case a person be deputed to serve it, in which case it shall be directed to such person), must contain the name or names of the defendant or defendants, if known; if unknown, give a description of him or them, and command the officer or person serving the same to summon the defendant or defendants to appear before such justice, at his

office in ——— township, at a time specified therein, and must describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him; and there shall be endorsed on the writ the amount for which the plaintiff will take judgment, if the defendant fail to appear. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs.

(32.) In actions where all the defendants may be summoned in the county where the action is commenced, the summons must be returnable not more than twelve days from its date, and must be served at least three days before the time of appearance. When all the defendants cannot be therein summoned, and summons is sent to any other county for service, it shall be returnable not more than thirty days from its date, and must be served at least twenty days before the time of appearance, as follows: First, by delivering a copy of the summons with the endorsement thereon, certified by the constable or person serving the same to be a true copy, to the defendant, or leaving the same at his usual place of residence; Second, acknowledgment on the back of the summons or the voluntary appearance of a defendant is equivalent to service.

(33.) A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, secretary, treasurer, clerk or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof.

(34.) When the defendant is an incorporated insurance company, and the action is brought in the county in which there is an agency thereof, the service may be upon the chief officer of such agency.

(35.) When the defendant is a foreign corporation, having a managing agent in this Territory, the service may be upon such agent.

(36.) When the defendant is a minor, under the age of fourteen years, the service must be upon him and upon his guardian or father; or if neither of these can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone shall be sufficient. The manner of service may be the same as in the case of adults.

(37.) In an attachment proceeding, if the order of attachment is made to accompany the summons, a copy thereof and the summons shall be served upon the defendant in the usual manner for the service of summons, if the same can be done within the county; and when any property of the defendant has been taken under the order of attachment, and it shall appear that the summons issued in the action has not been and cannot be served on the defendant in the county, in the manner prescribed by law, the justice of the peace shall continue the cause for a period of not less than thirty nor more than fifty days; whereupon the plaintiff shall proceed, for three consecutive weeks, to publish, in some newspaper printed in the coun-

ty, or, if none be printed therein, then in some newspaper of general circulation in said county, a notice, stating the names of the parties, the time when, by what justice of the peace, and for what sum said order was issued, and the time when the cause will be heard, and shall make proof of such publication to the justice; and thereupon said action shall be proceeded with the same as if said summons had been duly served.

(38.) When a summons is returned by the constable, or pary serving the same, the justice must note upon the summons the date of it's return, also enter the return of the summons upon his trial docket, together with the fees for serving the same, and file the summons with the other papers in the case.

(39.) Upon the filing of a praecipe by either party to the action, giving the names of the witnesses desired, the justice shall issue subpoeneas requiring the parties named therein to appear at the time, place and have therein named, to testify as witnesses in said cause. And if any witness, after having been duly served with a subpoena, neglects to appear at the time and place in response to said subpoena, the court is authorized to issue an attachment for him as a defaulting witness, and have the constable arrest and bring him before the court. Upon the defaulting witness being arrested and brought before the court, and failing to show a good and sufficient excuse for violating the order contained in the subpoena, the justice may, at his discretion tax the costs of the arrest against the defaulting witness.

CHAPTER III.

TIME FOR APPEARANCE

40. One hour in which to appear after time mentioned in summons. Judgment in default.
41. Dismissed without prejudice.
42. To vacate default judgment.
43. All conditions must be complied with.

(40.) Where due service of summons has been made, the parties are entitled to one hour in which to appear, after the time mentioned in the summons for appearance, or to which the case is adjourned, but are not bound to remain longer than that time, unless both parties have appealed, and the justice, being present, is engaged in the trial of another cause. In such case the justice may postpone the time of appearance until the close of such trial. After waiting one hour after the time specified in the summons for the trial and the plaintiff is present in person or by his attorney or agent, and the defendant is not present either in person or by attorney or agent, the justice will proceed with the trial and hear the proof of plaintiff's claim, and render judgment thereon against the defendant, being careful, however, not to render judgment for a greater amount than the sum specified in the summons, and also for the costs of the action. If the defendant is present in person, or by his attorney or agent, and the plaintiff fails to appear either in person or by his attorney or agent, the justice, upon motion of the defendant, will dismiss the action and tax the costs to the plaintiff. If, however, the defendant has filed a set-off or counter claim in a greater amount than the claim of the plaintiff, the justice will proceed to hear the proof upon said counter claim, and if convinced of its truth, will render judgment for the amount in excess of of plaintiff's claim, together with the costs of the action.

(41.) Judgment that the action be dismissed without prejudice to a new action, may be entered with costs, in the following cases: First, where the plaintiff voluntarily dismisses the action before it is finally submitted. Second, When he fails to appear at the time specified in the summons, or within one hour thereafter, or upon adjournment.

(42.) When judgment shall have been rendered against a defendant, in his absence, the same may be set aside upon the following conditions:

First: That his motion be made within ten days after such judgment was entered.

Second: That he pays or confesses judgment for the costs awarded against him.

Third: That he file an affidavit that he has a just and valid defense to the whole, or some part, of plaintiff's claim.

Fourth: That he notifies, in writing, the opposite party, his agent or attorney, or cause it to be done, of the opening of such judgment, and of the time and place of trial, at least five days before the time, if the party resides in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice, ten days before the trial.

(43.) Upon the defendant, his attorney or agent, complying with the first, second and third conditions, the justice will vacate the judgment, and again set the case for trial, being careful, however, to set it far enough off to enable the defendant to comply with the requirements of the fourth condition. As a condition upon which the judgment is vacated and a new trial granted, it is absolutely necessary that all four of the conditions be strictly complied with, otherwise the justice will vacate his order granting a new trial, and he will permit the original judgment to stand.

CHAPTER IV.

CHANGE OF PLACE OF TRIAL.

44. How change of place of trial may be secured.
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46. Justices must transmit papers and transcript.
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48. How they should be taxed.
49. When justice may adjourn trial upon his own motion.
50. Either party may take continuance for fifteen days.
51. Affidavit for adjournment for longer period than fifteen days.
52. When affidavit may be treated as a deposition.

(44.) If on the return of the process, or at any time before trial shall have been commenced, either party shall file with the justice of the peace before whom any cause is instituted or is pending for trial, an affidavit stating: First, that such justice is a material witness for either party; or, Second, that he verily believes that he cannot have a fair and impartial trial before such justice, on account of the bias or prejudice of the said justice against the affiant. or, Third, if a jury be demanded by the adverse party, then that he cannot, as he verily believes, have a fair and impartial trial in said township, on account of the bias or prejudice of the citizens thereof, the trial of the case must be changed to some other justice of the peace in the following manner:

(45.) If the place of the trial be changed on account of the bias or prejudice of the justice, or of his being a material witness in the cause, such cause shall be transferred for trial before some other justice of the peace of the same township, if there be one there legally competent to try such cause; if there be no such justice within such township, or if such change be granted on account of the bias or prejudice of the citizens of such township against such party, the case shall be taken to some justice in an adjoining township of the county.

(46.) The justice granting such change shall deliver or transmit the papers in the cause, together with a certified transcript of the proceedings before him, to the justice to whom such change may be granted, who shall proceed, therein, and have the same jurisdiction, powers and duties, in all respects whatever, as if such suit had been originally instituted before him.

(47.) Before any such change shall be allowed, the costs, as specified in the next following section, shall be paid by the party applying for such change, or he shall have confessed a judgment therefore before the justice granting the change.

(48.) When such a change is at the instance of the plaintiff, he shall be taxed with all the costs which have accrued. and which shall accrue in the cause, until such transcript and

names of the persons summoned, at the time appointed for the trial of the cause.

(58.) Jurors, for neglecting or refusing to attend when properly summoned, or refusing to serve when in attendance, shall be liable to a like penalty, and be proceeded against in the same manner, as witnesses who fail to attend or refuse to testify.

(59.) If upon the assembling of the jury the panel be not full, the constable, whose duty it is to be in attendance on the court at and during the progress of the trial, may fill the same in the same manner as is done by the sheriff in the district court, that is, the constable shall select a talesman to supply the deficiency from the bystanders, or the body of the county, as the court may direct. In like manner shall the constable fill all vacancies arising through challenges.

(60.) Before examining the jury as to qualifications, the justice must swear (or affirm) the jury to truthfully answer all questions propounded to them touching their qualifications to sit as jurors in the case at trial.

(61.) Either of the following grounds is sufficient to disqualify a person from sitting as a juror:

First: If he has been convicted of any crime which by law renders him disqualified to serve on a jury.

Second: If he has been arbitrator on either side, relating to the same controversy.

Third: If he has an interest in the cause.

Fourth: If he has an action pending between him and either party.

Fifth: If he has formerly been a juror in the same case.

Sixth: If he is the employer, employe, counselor, agent, steward or attorney of either party.

Seventh: If he is subpoenead as a witness in the case.

Eighth: If he is kin to either party.

Ninth: If he is biased or prejudiced for or against either party.

Tenth: If he entertain an opinion as to who should prevail in the case.

Eleventh: If he has an opinion as to the merits of the case, and that opinion is one that it will require evidence to remove.

Twelfth: If he lacks a competent knowledge of the English language, or for any other cause that may render him, at the time, an unsuitable juror.

(62.) After the jury has been sworn to answer the questions touching their qualifications to sit as jurors, the plaintiff, his attorney or agent, should briefly state the title and object of the case, and proceed to examine the jurors as to their qualifications. If a juror is challenged for cause and the challenge is sustained the vacancy shall be filled before further examination or challenges are made. After the plaintiff has finished examining the jury, he passes the jury for cause, and then the defendant, his attorney or agent, shall proceed in like manner to examine the jurors.

(63.) After both sides have examined and passed the jury for cause, each side has two peremptory challenges of the talesmen, if any be on the jury. A peremptory challenge is one for which no cause need be assigned. Either party, however, can waive his right to peremptorily challenge the talesmen. In exercising the right to peremptorily challenge a talesman, the plaintiff makes the first challenge, the defendant the second, the plaintiff the third, and the defendant the fourth, When a talesman is dismissed from the jury upon a peremptory challenge, his place must be immediately filled, and his successor shall be examined in the same manner as the other jurors were, and can be challenged for cause, if cause exist, or can be peremptorily challenged, but in no case shall either side have more than two peremptory challenges.

(64.) By agreement between the plaintiff and the defendant, the case may be tried before a jury of three, four, or five jurors.

(65.) When the jurors have been examined and accepted, the justice must administer an oath or affirmation to them, to well and truly try the matter in difference between the parties, and a true verdict give according to the law and the evidence.

(66.) In a justice of the peace court, the jury is judge of the law and the facts, and the justice has no right to instruct them as to the law in the case.

(67.) After the jury has been sworn, the jurors must sit together and hear the proofs and allegations of the parties, and, after hearing the same, shall be kept together in some convenient place, under the charge of a constable, until they have agreed upon their verdict or shall be discharged by the justice.

(68.) When the jurors shall have agreed upon their verdict, they shall deliver it to the justice publicly, who shall enter it upon his docket.

(69.) Whenever the justice shall be satisfied that a jury, sworn in any cause before him, cannot agree upon their verdict, after having consulted upon it a reasonable time, he may discharge them and continue the cause, and may, if required by either party, proceed to strike another jury in the manner and under the same requirements as hereinbefore provided. The cause shall be continued until such time as the justice thinks reasonable, unless the parties or their attorneys agree on a longer or a shorter time, or unless they agree that the justice may render judgment on the evidence already heard before him.

CHAPTER VI.

PROCEDURE OF TRIAL OF CAUSE

70. Plaintiff introduces first evidence.
71. Enforcing the rule.
72. Cross examinations.
73. Defendant's evidence.
74. Rebuttal.
75. Things to be taken as true unless denied under oath.
76. Justice to rule upon admissability of evidence.
77. Argument of case.
78. Jury retires under control of constable.
80. When justice must render judgment.
81. Either party may remit excess.
82. Effect of offer to confess judgment.
83. Granting of a new trial.
84. Notice to opposite party.
85. Notice of motion for new trial

(70.) After the jury has been sworn, or in case a jury has not been demanded, and the case is to be tried before the justice without a jury, the plaintiff introduces his evidence. The witneses, however, must be sworn, or affirmed, before being permitted to testify.

(71.) It is a very common occurence in trials in a justice of the peace court to ask for the enforcement of the rule excluding witnesses from the court room, while another witness is on the witness stand. This matter is discretionary with the justice, and he is at liberty to exercise his good judgment in the matter, and to take into consideration the inconvenience and discomfort it is liable to, at times, inflict upon the witnesses. However, if upon demand of either or both parties the justice sees fit to enforce the rule, he should instruct the witnesses to retire from the room, out of hearing of the testimony being given by the witness on the stand, to refrain from talking to each other about what they testified to on the witness stand, and to remain within calling distance, so they may be called, as wanted, without causing any unnecessary delay.

(72.) After the plaintiff has examined his witness, the defendant shall have a right to cross examine the witness upon every material matter brought out by the plaintiff's direct examination of the witness.

(73.) When the plaintiff has finished introducing his evidence, the defendant shall introduce his, and if he introduces oral testimony, the plaintiff shall have the same right to cross examine the defendant's witnesses as the defendant had to cross examine the plaintiff's witnesses.

(74.) At the conclusion of the introduction of evidence by the defendant, the plaintiff can, if he desires, introduce further evidence for the purpose of reouttal.

(75.) In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or any appointment or authority, or the correctness of an account duly verified by the affidavit

or affirmation of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the opposite party, his agent or attorney. Undoubtedly the object of the legislature in creating a law to this effect was to expedite justice at as small cost as possible. As stated in this paragraph, the alegations referred to must be taken as true, unless denied by the affidavit of the opposite party. And this denial under oath must be made before the case goes to trial, otherwise they will be taken as true and the opposite party will not be permitted to introduce evidence to dispute them. If they are denied by the affidavit of the opposite party, then the burden of proving the allegations rest upon the party making them, and it might be necessary to ask for a continuance in order to procure the necessary evidence, hence the object of the law in requiring that they be denied by affidavit, otherwise they will be taken as true.

(76.) In all actions tried before a jury in justice's court, the justice shall determine all questions of law as they arise on the introduction of evidence during the trial, but in no case shall he instruct the jury on questions of law or fact. To make it more plain, where an objection is interposed, the justice is to rule upon the admisability or inadmisability of a witness answering certain questions, or the introduction of certain documents as evidence, but he must not interfere with the jury's right to be the sole judges of the law and facts in the case.

(77.) At the conclusion of the introduction of evidence by both sides, the parties must be allowed to present their argument to the jury or to the court if there be no jury. The plaintiff shall have the right to open and close the argument. If the plaintiff desires to read law to the jury, or the court, he must present and read his law during his opening argument, in order that the defendant may have an opportunity to answer it. At the conclusion of the plaintiff's opening argument, the defendant shall be given an opportunity to make his argument and read and present his law upon the case, after which the plaintiff shall be permitted to close the argument. Either or both sides may waive their right to argue the case. The plaintiff can waive the opening argument, but when he does so his argument should be confined to simply answering the argument presented by the defendant.

(78.) At the conclusion of the argument the jury shall retire under the care and custody of the constable to deliberate upon a verdict, and shall remain in the custody of the constable until they have returned into court a verdict, or until they shall be discharged by the court.

(79.) In case the jury fails to arrive at a verdict, see chapter entitled "The Jury."

(80.) Upon the return of a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if property has been attached; in other cases it must be entered either at the close of the trial, or, if the justice then desires further time to consider, on or by the fourth day thereafter, both days inclusive.

(81.) When the amount due to either party exceeds the sum for which the justice is authorized to enter judgment, such par-

ty may remit the excess, and judgment may be entered for the residue. A defendant need not remit such excess, and may withhold setting the same off; and a recovery for the amount set off and allowed, or any part thereof, shall not be a bar to his subsequent action for the amount withheld.

(82.) If the defendant, any time before trial, offers, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefore, with the costs then accrued; but if he do not accept such offer before the trial, and fails to recover, in the action, a sum equal to the offer or if it be a suit for wages and he fails to recover a sum greater than the offer, he cannot recover costs accrued after the offer, but all costs accruing after the offer must be adjudged against him; but the offer, and failure to accept it, cannot be given in evidence or mentioned on the trial.

(83.) The justice before whom a cause has been tried, on motion of the party aggrieved, at any time within five days after the decision or verdict, shall vacate the decision or verdict and grant a new trial, upon either of the following causes being proven:

First: Irregularity in the proceedings of the court, jury, or prevailing party, or any order of the court, or abuse of discretion, by which the party was prevented from having a fair trial. (2 Kan. 333; 15 Kan. 173; 30 K. 190; 36 K. 408; 37 K. 267.)

Second: Misconduct of the jury or prevailing party. (40 K. 588.)

Third: Accident or surprise, which ordinary prudence could not have guarded against. (30 K. 242-380; 32 K. 107.)

Fourth: Excessive damages, appearing to have been given under the influence of passion or prejudice. (34 K. 472.)

Fifth: Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property. (37 K. 231.

Sixth: That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. (40 K. 489-503.)

Seventh: Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. (39 K. 320.)

Eighth: Error of law occuring at the trial and excepted to by the party making the application. (33 K. 61, 190, 252, 340, 362, 387.)

(84.) If the motion for a new trial is granted, the justice shall set a time for the new trial, of which the opposite party shall have at least three days notice.

(85.) The opposite party shall also have a reasonable notice of such motions for a new trial, if the same is not made on the day of the former trial, and in the presence of such party; such notice to be given by the applying party. If the new trial shall be granted, or the jury unable to agree, the proceedings shall be, in all respects, as upon the return of the summons. It is error to over rule, pro forma, a motion for a new trial. (32 K. 163; 44 K. 637.)

CHAPTER VII.

FORCIBLE ENTRY AND DETAINER.

86. Original jurisdictions.
87. Nature of the actions defined.
88. Distinctions between forcible entry and detainer and forcible detainer.
89. Right is barred in two years.
90. Notice to quit.
91. Filing of the complaint.
92. Issuing summons, and service of same.
93. No answer required.
94. Cause must be tried out.
95. Continuance.
96. Rendering judgment.
97. Verdict in case of trial by jury.
98. Justice renders judgment upon verdict.
99. Exceptions can be taken.
100. Writ of restitution.
101. Method of serving writ.
102. Appeal.
103. Not a bar to other actions.

(86.) Any justice, within his proper county, has original jurisdiction to try and determine cases arising under the head of forcible entry and detainer, or forcible detainer.

(87.) A forcible entry and detainer is a violent taking and keeping possession by one of any lands and tenements occupied by another, by means of threats, force, or arms, and without authority of law. The object of an action in forcible entry and detainer is to protect the actual possession of real estate against unlawful and forcible invasions, to remove occasion for actual violence in defending such possession, and to punish breaches of the peace committed in the entry upon or detainer of real property. The main object, therefore, being to preserve the public peace and prevent persons from asserting their rights, real or supposed, by force and violence. This proceeding can be maintained without regard, as a rule, to the question of title, right of entry, or right of possession, for a person might be vested with the title, right of entry or right of possession, and at the same time commit an unlawful and forcible entry.

(88.) There is a distinction, however, between Forcible Entry and Detainer and Forcible Detainer. One who makes an unlawful and forcible entry into lands and tenements, and detains the same, is guilty of forcible entry and detainer. But where one having made a lawful and peaceable entry into land or tenements, unlawfully and by force holds the same, he is guilty of forcible detainer. Such an action may be brought against tenants holding over their terms; in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made; in sales by executors, administrators, guardians, and on partition, where any of the parties to the partition were in possession at the commencement of the suit, after such sales, so made, on execution or otherwise, shall have been examined by the proper court, and the same, by said court, adjudged legal;

and in cases where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession.

(89.) The right to maintain an action of forcible entry and detainer, or of forcible detainer, is barred if two years have elapsed since the right to bring said action accrued. (25 Kan. 659.)

(90.) It shall be the duty of the party desiring to commence an action of this kind, to notify the adverse party to leave the premises, for the possession of which the action is about to be brought, which notice shall be served at least three days before commencing the action, by leaving a written copy with the defendant, or at his usual place of abode, if he cannot be found; such notice may also be served by leaving a copy thereof with some person over twelve years of age, on the premises described in the notice. Proof of service of this notice must be made at the trial.

(91.) Within a reasonable time, after serving notice to leave the premises, the plaintiff must file his complaint in writing, under oath, with the justice, which must particularly describe the premises so entered upon and detained, and must set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceful or lawful entry of the described premises. It is absolutely necessary that the act charged in the complaint must be alleged as being unlawful and forcible.

(92.) Upon the filing of the complaint the justice must issue a summons. The summons must state the cause of complaint, and the time and place of trial, and shall be served and returned as in other cases. It may also be served by leaving a copy thereof with some person over twelve years of age, on the premises sought to be recovered. Such service shall be at least three days before the day of trial appointed by the justice.

(93.) It isn't necessary for the defendant to file any answer. Simply a plea of "not guilty" raises every issue in the case. However should the defendant file any pleading setting up title in himself to the property, it does not necessarily take the case out of the jurisdiction of the justice of the peace. True a justice is without jurisdiction to try and determine title to real estate, but in a case of this nature, where the defendant raises the question of title, by his pleading, the court may proceed with the hearing of the case to ascertain whether the title is an issue in the case. The fact that one is possessed of the title to certain property does not give him the right to forcibly and unlawfully take possession thereof. (See 4th Oklahoma, page 521.)

(94.) If the defendant does not appear in accordance with the requisitions of the summons, and it shall have been properly served, the justice shal try the cause as though he was present.

(95.) No continuance shall be granted for a longer period than eight days, unless the defendant applying therefor shall give an undertaking to the adverse party, with good and sufficient surety, to be approved by the justice, conditioned for the payment of all damages, and double the rent that may accrue, if judgment be rendered against the defendant.

(96). If the suit be not continued, place of trial changed, or neither party demand a jury upon the return day of the summons, the justice shall try the cause; and if, after hearing the evidence, he shall conclude that the complaint is not true, he shall enter judgment against the plaintiff for costs; if he find the complaint true, he shall render a general judgment against the defendant, and in favor of the plaintiff, for restitution of premises and costs of suit; if he find the complaint true in part, he shall render a judgment for the restitution of such part only, and costs shall be taxed as the justice shall deem just and equitable.

(97.) If a jury be demanded by either party, the proceedings thereof shall be in all respects as in other cases. The jury shall be sworn or affirmed to well and truly try and determine whether the complaint of (naming the plaintiff) about to be laid before them, is true according to the evidence. If the jury shall find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, then a general verdict of not guilty; if true in part, then a verdict setting forth the facts they find true.

(98.) The justice shall enter the verdict upon his docket, and then render such judgment in the action as if the facts authorizing the finding of such verdict had been found to be true by himself.

(99.) Exceptions to the opinions of the justice, in cases under this head, upon questions of law, may be taken by either party, whether tried by jury or otherwise.

(100.) Where a judgment of restitution shall be entered by a justice, he shall, at the request of the plaintiff, his agent or attorney, issue a writ of execution thereon, and place the same in the hands of the constable to serve.

(101.) The constable shall, within ten days after receiving the writ, execute the same by restoring the plaintiff to the possession of the premises, and shall levy and collect the costs and make return, as upon other executions. If the officer shall receive a notice from the justice that the proceedings have been stayed by proceedings in error, or appeal, he shall immediately delay all further proceedings upon the execution; and if the premises have been restored to the plaintiff, he shall immediately place the defendant in the possession thereof, and return the writ with his proceedings and costs taxed thereon, of which the justice must make a record in his docket.

(102.) In appeals taken by the defendant in actions for the unlawful and forcible entry and detention, or unlawful and forcible detention of real property, the undertaking on appeal shall be conditioned that the appellant will not commit or suffer waste to be committed on the premises in controversy; and if, upon the further trial of the cause, judgment be rendered against him, he will pay double the value of the use and occupation of the property from the date of the undertaking until the delivery of the property, pursuant to the judgment, and all damages and costs that may be awarded against him. The sureties upon the appeal bond must be required to qualify under oath, and the justice can, if he so desires, require the sureties to list their property, together with all their debts and liabilities, in order to ascertain the truth as to their actual worth

as sureties. The justice should ascertain the reasonable rental value of the property for the time it is liable to remain in the possession of the defendant, and then require the surety on the appeal bond to qualify in a total sum sufficient to equal double the rental, and to cover the probable damages and costs.

(103.) Judgments, either before a justice or in the district court, in actions brought under this head, shall not be a bar to any other action brought by either party.

CHAPTER VIII.

ATTACHMENT.

104. Affidavit must be filed.
105. May attach at or after commencement of suit.
106. Before whom the affidavit may be made.
107. It must be positive in its declarations.
108. Undertaking must be filed before order is issued.
109. Order of attachment.
110. Return day of the order.
111. Manner of serving the order
112. Forthcoming bond.
113. One inventory and appraisement sufficient for several attachments.
114. When personal service summons cannot be obtained.
115. Attached property of a perishable nature.
116. When judgment is for the defendant.
117. Satisfaction of judgment.
118. Constable may repossess himself of property.
119. Where attachments are issued by different justices.
120. What officer's return must show.
121. Bond to discharge attachment.
122. Certified to district court.
123. Counter affidavit.
124. Attached property not to be released when appeal is taken.

(104.) The right to attach on mesne process is an extraordinary power given by statute against common right, and no title can be acquired by its exercise except by a strict compliance with the terms of the statute. In all of the states except Connecticut, Maine, Massachusets, New Hampshire, and Vermont, and in all of the territories, it has been specially provided by statute that no attachment shall issue until an affidavit alleging the necessary facts or grounds for the attachment has been made by the proper party. The statutory requirement of the affidavit is a jurisdictional one, and consequently its omission will render all subsequent proceedings void.

(105.) The plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant upon the grounds provided therefor in the statutes.

(106.) The affidavit alleging the facts or grounds on which, under the statute, the attachment is authorized should be made prior to or contemporaneous with the issue of the writ. The affidavit for the issue of a writ of attachment may be made before any officer having authority to take and certify affidavits generally.

(107.) The affidavit may be made by the plaintiff, his agent or attorney. It must be positive in its declaration, based upon the personal knowledge of affiant, as an affidavit in attachment based upon he "verily believes" or "to the best of his knowledge and belief" is fatally defective.

(108.) Regardless of the fact as to whether the defendant is a resident or a non-resident, in an attachment proceeding

before a justice of the peace, the order of attachment shall not be issued by the justice until there has been executed in his office, by one or more sufficient sureties of the plaintiff to be approved by the justice, an undertaking, not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained. The statutory form of the bond should be followed, because it is always sufficient, although a bond in substantial compliance with the statute is sufficient. If the plaintiff sees fit to give a larger amount of bond than is required by the statute it does not invalidate the bond.

(109.) The order of attachment may be made to accompany the summons, or at any time afterward before judgment; it shall be addressed and delivered to any constable of the proper township, and shall require him to attach the goods, chattles, stocks or interest in stocks, rights, credits, moneys and effects of the defendant in his county, not exempt by law from being applied to the payment of the plaintiff's claims, to be stated in the order as in the affidavit, and the probable costs of the action, not exceeding fifty dollars.

(110.) The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons; when issued afterwards, it shall be executed and returned forthwith.

(111.) When there are several orders of attachment against the same defendant, in the hands of the same officer, they must be executed in the order in which they were received by said officer. He shall go to the place where the defendant's property may be found, and there, in the presence of two credible persons, declare that by virtue of said order, he attaches said property at the suit of such plaintiff; and the officer, with two householders of the county, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisement of all property attached, which shall be signed by the officer and said householders and returned with the order; when the property can be come at, he shall take the same into his custody, and hold it subject to the order of the justice.

(112.) The constable shall deliver the property attached to the person in whose possession it was found, upon the execution by such person, in the presence of the constable, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound in double the appraised value therof, that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action; but if it shall appear to the court that any part of said property has been lost or destroyed by unavoidable accident, the value thereof shall be remitted to person or persons so found.

(113.) Different attachments of the same property may be made, and one inventory and appraisement shall be sufficient. The lien of attachments shall be in the order in which they are served and the subsequent attachments shall be served on the property as in the hands of the officer, and subject to the prior attachments. The justice who issued the attachment having

the priority of lien, shall determine all questions as to the priority of liens on the property attached.

(114.) If the order of attachment is made to accompany the summons, a copy thereof and the summons shall be served upon the defendant in the usual manner for the service of summons, if the same can be done within the county; but when any property of the defendant has been taken under the order of attachment, and it shall appear that summons issued in the action has not been and cannot be served on the defendant in the county, in the manner prescribed by law, then service must be procured as provided for in this work under the head of "service by publication."

(115.) When the cause is continued to procure service of summons by publication, and it shall appear to the court that any of the property taken under the attachment is live stock, or is of a perishable nature, the justice may issue his order in writing directing the officer having custody thereof, to dispose of the same as upon execution; and the moneys realized therefrom shall be paid over to the justice, and applied as other money realized from the sale of property attached is applied.

(116.) If judgment be rendered, in the action, for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, shall be returned to him.

(117.) If judgment be rendered for the plaintiff, it shall be satisfied as follows:

So much of the property remaining in the hands of the officers, after applying the moneys arising from the sale of perishable property, and so much of the personal property, if any, as may be necessary to satisfy the judgment, shall be sold, by order of the justice, under the same restriction and regulations as if the same had been levied on by execution; and the money arising therefrom, with any amount that may have been recovered from a garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy the same, the judgment shall stand, and execution may issue thereon for the balance, in all respects as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant.

(118.) The justice may order the constable to reposess himself for the purpose of selling it, of any of the attached property which may have pased out of his hands without having been sold or converted into money; and the constable shall, under such order, have the same power to take the property as he would have under an order of attachment.

(119.) Where several attachments are executed on the same property, the justice issuing the first order severed, on motion of any of the plaintiff's, may determine the amounts and priorities of the several attachments, and the proceeds shall be applied accordingly.

(120.) The officer shall return, upon every order of attachment, what he has done under it, The return must show the property attached, and the time it was attached. The officer shall also return, with the order, all undertakings given under it.

(121.) If the defendant, or other person in his behalf, at any time before judgment, cause an undertaking to be executed, to the plaintiff, by one or more sureties, resident in the county, to be approved by the justice, in double the amount of the plaintiff's claims, to be stated in his affidavit, to the effect that the defendant shall perform the judgment of the justice, the attachment in such action shall be discharged, and restitution made of any property taken under it, or the proceeds thereof.

(122.) If, in any case where an order of attachment has been issued by a justice of the peace, it shall appear from the return of the officer, and from the examination of the garnishee, that no property, moneys, rights, credits or effects of the defendant has been taken under the attachment, but that the defendant is the owner of an interest in real estate in the county, the justice before whom such action is pending shall, at the request of the plaintiff, forthwith certify his proceedings to the district court of the proper county; and thereupon the clerk of said court shall docket said cause, and the action shall be proceeded with in said court in all respects as if the same had originated there.

(123.) If the defendant shall, before the trial is commenced, file an affidavit, denying the ground laid for the attachment in the plaintiff's affidavit, the justice shall, on reasonable notice, in writing, being given to the opposite party, proceed to examine into the truth of the grounds laid for such attachment, and shall hear such evidence as may be produced by either party; and if it appear that such grounds are not sustained by the evidence, the justice shall discharge the attachment.

(124.) The plaintiff in an action in attachment, may appeal to the district court of the county wherein said action is brought, from an order of a justice of the peace, dissolving an attachment, by filing an appeal bond as in other cases. When the plaintiff shall notify the defendant that he intends to appeal from the order of the justice of the peace dissolving an attachment, the property attached shall not be released until the expiration of ten days, after such order, and upon the giving of such appeal bond, such attached property shall be held to abide the order and judgment of the district court where the motion to dissolve the attachment shall be tried de novo.

CHAPTER IX.

GARNISHMENT

126. Nature of garnishment.
127. Must have jurisdiction of principle case.
128. When appearance confers jurisdiction.
129. When appearance does not confer jurisdiction.
130. Property must be within the county.
131. Jurisdiction in original case is not conferred by garnishee appearing and answering.
132. Proceedings must be in same court in which the principal suit was instituted and judgment recorded.
133. Affidavit in garnishment.
134. Summons in garnishment.
135. Service of summons.
136. Officer's returns.
137. Answer of garnishee.
138. If garnishee fails to appear and answer.
139. Garnishee may pay money into court.
140. Garnishee liable after summons.
141. When garinshee appears and answers.
142. Service by publication.
143. When plaintiff may proceed against garnishee.
144. Exceptions to answer of garnishee.
145. When judgment rendered.
146. Effect of appeal by plaintiff.
147. When earnings of debtor are exempt.

(125.) In treating the subject of garnishment we have deemed it admissable to do so under a separate chapter from Attachment, realizing the fact that the procedure prescribed by the statute is a little too vague for the ordinary justice of the peace, who ordinarily is not a lawyer. Our experience has taught us that proceedings in garnishment cause more complications in a justice court than almost any other kind of proceedings. To obviate this, we have herein attempted to enter fully into the matter, and make it as plain as possible.

(126.) While garnishment accomplishes the same purpose as an attachment or execution, it differs from them in that it is in no sense a levy upon the property of the garnishee. It is a judicial proceeding by which a new judgment is obtained. In its present sense, it is defined to be in the nature of a proceeding in rem, in aid of an attachment or execution, or a pending suit by which the property, effects, and credits of a debtor in the hands of, or due from, a third party are subjected to the payment of his debts. The proceeding is also against the garnishee personally, for the purpose of compelling him to answer for the value where the thing itself is not produced.

(127.) Where the court did not acquire jurisdiction of the principal case, it can have no jurisdiction to entertan a garnishment proceeding, since such proceeding is ancillary to the the principal case. Thus a court may fail to acquire jurisdiction of the principal case through a failure of a summons on the principal defendant, or by reason of some defect in such service.

(128.) A general appearance by the defendant in the principal suit, before the commencement of the garnishment proceedings, will give the court jurisdiction of the latted, even

though there may be want of srvice, or defects or irregularities in the proceedings against the principal defendant. Where, however the defendant's appearance is after the commencement of the garnishment proceedings, such appearance, while waiving irregularities or defects so far as he himself is concerned, will not revive the void proceeding so as to sustain the garnishment.

(129.) Defects in the proceedings in the principal action will not be cured by the defendant's appearance in the garnishment, and jurisdiction over the garnishment suit will not be conferred by such appearance.

(130.) Garnishment being a proceeding in rem, it is not enough that the garnishee be within the jurisdiction of the court issuing the process, but the property, corporeal or incorporeal, must be within the limits over which the court has jurisdiction in order that it may be seized to satisfy the judgment, and the garnishee cannot be compelled to bring it within the jurisdiction of the court.

(131.) Objection on the ground of jurisdiction in the principal case is not waived by the garnishee appearing and answering, but may be raised at any stage of the action. The garnishee can only inquire as to whether the court had jurisdiction of the principal case, since, if the court has jurisdiction, he will be protected in all payments made by him under the order of the court, however irregular the proceedings may be.

(132.) Garnishment proceedings must be instituted in the same court in which the judgment in the principal suit is recorded, or in which the principal suit is pending.

(133.) In all personal actions arising upon contract before justices of the peace, if the plaintiff, his agent or attorney, shall file with the justice, at the time of or after the commencement of suit, an affidavit stating that he has good reason to believe, and does believe, that any person or corporation, to be named, and within the county where the action is brought, has property, money, goods, chattels, credits and effects in his hands or under his control, belonging to the defendant, or that such person or corporation is anywise indebted to the principal defendant, whether such indebtedness be due or not, that the principal defendant (naming him) is justly indebted to the plaintiff in a given amount over and above all legal setoff, and that the plaintiff has a good reason to and does believe that he will lose the same unless a garnishee summons issue to the aforesaid person, a garnishee summons shall be issued and personally served, in the same manner as an ordinary summons, and from the time of such service the garnishee shall stand liable to the plaintiff for all property, money or articles in his hands or due from him to the defendant.

(134.) Said garnishee summons shall be directed to the proper officer, reciting the commencement of suit against the principal defendant and the filing of the affidavit, and thereupon commanding said officer to warn and summons such person to appear before said justice, on a day and hour named, not more than twenty days from the date of issuing the same, to make disclosure, under oath, to be filed with the said justice, touching his liability as garnishee of the principal defendant (naming him) as charged in said affidavit, and thenceforth to pay no money and deliver no property to the defendant (nam-

ing him), and of said writ to make due returns; Provided, that when the garnishee is a corporation, the answer day for such garnshee shall in no case be less than ten days from the day of service of the garnishee summons; and if the office or place of business of the president or other head of said corporation, or of the secretary, cashier or other managing agent thereof, is not held or kept in the county where the action is pending, the answer day for such garnishee shall not be less than twenty days from the day of service of summons.

(135.) The garnishee summons shall be served upon the garnishee as follows: If he be a person, it shall be served upon him personally, or left at his usual place of residence; if a corporation, it shall be left with the president, or other head of the same, or the secretary, cashier or managing agent thereof.

(136.) The officer's return must state the names of the garnishees, and the time each garnishee was served with summons.

(137.) The garnishee shall appear before the justice in accordance with the command of the summons, and shall answer, under oath, all questions put to him touching the property of every description and credits of the defendant, in his possession or under his control; and he shall disclose truly the amount owing by him to the defendant, whether due or not; and in the case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of the summons. The examination of the garnishee, with the questions and answers, shall be reduced to writing by the justice, or in his presence, signed by the party and filed, unless the parties otherwise agree.

(138.) If the garnishee do not appear and answer, in response to the summons, the justice may proceed against him by attachment, as for contempt.

(139.) A garnishee may pay the money owing to the defendant by him into court. He shall be discharged from liability to the defendant for any money so paid, not exceeding the plaintiff's claim. He shall not be subject to costs beyond those caused by his resistance of the claim against him, and if he disclose the property in his hands, or the true amount owing by him to the defendant, and deliver or pay the same according to the order of the court, he shall be allowed his costs.

(140.) A summons in garnishment, when properly served, binds the property, and the garnishee shall stand liable to the plaintiff for all property, moneys and credits in his hands, or due, from him to the defendant, from the time he is served with the summons; but when property is garnisheed in the hands of a consignee or other person having a prior lien, his lien thereon shall not be affected by the garnishment.

(141.) When the garnishee appears and answers that he has property, moneys and credits in his hands or due from him to the defendant, the court should order him to deliver the same into court, the court to hold the same pending the termination of the suit.

(142.) When it shall appear to the justice from the answer of the garnishee that he has property, moneys, credits, chattels or effects in his hands, or under his control, belonging to the

defendant, or that the garnishee is anywise indebted to the defendant, and that the summons issued in the original action has not been and cannot be served on the defendant in the county in the manner prescribed by law, the justice shall continue the cause for a period of not less than thirty nor more than fifty days, and thereupon service may be made by publication in the same manner and with like effect as is prescribed by law in proceedings in attachment before justices of the peace.

(143.) If the garnishee fails to appear and answer, or if he appears and answers, and his disclosure is not satisfactory to the plaintiff, or if he fails to comply with the order of the justice to deliver the property and pay the money owing into court, the plaintiff may proceed against him in an action, in his own name, as in other cases; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff for the amount of the property and credits of every kind, of the defendant in the possession of the garnishee. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appears in the action that such disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other actions. When the claims of the plaintiff in the action are satisfied by the garnishee, he may, on motion, be sustained as plaintiff in the judgment.

(144.) The plaintiff may give notice to the justice that the answer of the garnishee is unsatisfactory, and demand a trial of the truth of such answer, and the justice shall thereupon appoint a day and have for such trial, which shal be conducted, in all respects, as in other cases.

(145.) Final judgment shall not be rendered against the garnishee until the action against the principal defendant in the original suit has been determined; and if, in such action, judgment be rendered for the defendant, the garnishee shall be discharged and recover costs. If the plaintiff shall recover against the defendant in the original suit, and the garnishee shall deliver of all property, moneys and credits of the defendant in his possession, and pay all the moneys from him due, as the court may order, the garnishee shall be discharged, and the costs of the proceedings against him shall be paid out of the property and moneys so surrendered, or as the court may think right and proper.

(146.) The plaintiff in an action may appeal to the district court of the county wherein said action is brought, from an order of a justice of the peace releasing a garnishee, by filing an appeal bond as in other cases, and the effect and proceedure shall be the same as an appeal from a justice of the peace dissolving an attachment.

(147.) The earnings of the debtor for his personal services, at any time within three months next preceeding the isssuing of a summons in garishment, cannot be applied to the payment of his debts, when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the maintenance of a family supported wholly or partly by his labor.

CHAPTER X.

REPLEVIN

148. Replevin defined.
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151. When amount exceeds the jurisdiction.
152. Value of property as alleged in affidavit and writ is test of juridictional amount.
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157. A tenant in common must join his co-tenants. Joint owners of personal property Partners.
158. When the officer is the proper party defendant.
159. When the father should bring the action.
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165. Undertaking.
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167. Description of property.
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171. Writ is officer's authority.
172. Can only take property from person named in writ.
173. Delivery bond.
174. Justification of sureties.
175. Plaintiff's affidavit as to value of property fixes the jurisdiction.
176. Effect of dimissing case by agreement.
177. Failure to prosecute.
178. Damages and judgment.
179. The judgment.
180. When property has been delivered to plaintiff.
181. When property claimed has not been taken.
182. Constable may break open a building.
183. Concealing property.
184. When justice is liable for damages.

(148.) Replevin is a justicial writ to the constable, complaining of an unjust taking and detention of goods or chattels, commanding the constable to deliver back the same to the owner upon security given to make out the injustice of such taking, or else to return the goods or chattels. The gist of the action is the plaintiff's right to the immediate possession of the property at the commencement of the suit. The primary object of replevin is to recover the property in specie; the secondary object is to recover its value with damages for detention, where specific recovery cannot be had. Since the question is, who was entitled to the property when the action was commenced, the right of possession to no other property than that originally claimed will be considered.

(149.) Replevin is a civil action, subject to the same rules as other civil actions.

(150.) Only the property taken under the writ is within the jurisdiction of the court and can be affected by an order to return or by a judgment.

(151.) The court is powerless to approve the bond, issue the writ, or take any step in the action, if the amount for which the writ is requested exceeds its jurisdiction; and it should of course, dismiss the acton.

(152.) The value of the property as alleged in the plaintiff's affidavit and the writ is the test of the jurisdictional amount, and not the catual value as afterwards determined.

(153.) Every complaint in an action of replevin should contain an allegation of nenne.

(154.) The test as to whether a given party is the proper party plaintiff in an action of replevin turns upon the question whether he is at the time of instituting suit entitled to right of possession and not the right of property, and the proper party defendant must at the time be in possession or control of the property. Hence, when property in a third person is shown, it is unnecessary for such person to become a party to the action, for the person in possesion of the property, whether he claims it as owner, agent, administrator, trustee, custodian, or in any other capacity, is the only proper defendant.

(155.) In replivin both parties are equally actors, so that a nonsuit is improper.

(156.) The trustee, having the legal title in himself, and not the beneficiary, is the proper party in an action of replevin to recover trust property. But one party cannot in his own name bring an action of replevin for the use of another without being entitled to actual possession in his own rght. The mortgagee is the proper party in an action of replevin to recover possession of mortgaged property. The bailee or pledgee is the proper party to bring replevin to recover property withheld from his possession. Possession by an agent is sufficient to authorize him to sue in his own name for recover, or be sued. In his own name an administrator may maintain replevin for any property to which his intestate had the right of possession.

(157.) One tenant in common cannot maintain replevin for chattels without joining his cotenants; nor can they severally bring replevin against each other until after a division of the common property. Joint owners of personal property must join in an action of replevin, and hence they cannot for their respective shares maintain the action against each other before a division of property. If the property taken or detaned is partnership property, all of the partners must join in an action of replevin for its recovery, even though it was taken from the manual possessions of but one partner, and so must they be joined as defendants. Under particular circumstances in some cases a single partner may sue in his own name, especially where he is entitled to possession himself, but the action of replevin cannot be brought by one partner against another.

(158.) Since the replevin must be brought against the party in possession, the officer, and not the execution creditor, is the only necessary party in an action to recover property seized under process.

(159.) Where an officer seizes the property of children in an action against the father, the latter may, in his own name, as the custodian for the children, sue in replevin for its recovery without necessarily joining the children.

(160.) Different persons in possession of separate articles of goods cannot be made defendants in a single action of replevin, but each should be sued severally, although if a servant takes property in the course of his services, he may, in an action to recover it, be made, a joint defendant with the master.

(161.) A third party claiming the ownership of replevied property has the right to be made a defendant in the suit and assert his claim; nor should his answer asserting his ownership and right of possession be stricken from the files for omission to state the evidence of his title, which is a matter to be shown at the trial.

(162.) Where parties are improperly joined in replevin the defect may, on application, be corrected by amendment.

(163.) Justices of the peace have jurisdiction in replevin actions for the recovery of specific personal property not exceeding one hundred dollars in value.

(164.) An action for this purpose shall not be brought until there is filed in the office of the justice an affidavit of the plaintiff, his agent or attorney, showing:

First, A discription of the property claimed.

Second, That the plaintiff is the owner thereof, or has a special ownership therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property.

Third, That the property is wrongfully detained by the defendant.

Fourth, That it was not taken in execution on any order or judgment against said plaintiff, or if so taken on execution, that it is by statute exempt from seizure, or for the payment of any tax, fine or amercement assessed against him or by virtue of an order of delivery issued under this article, or any other mesne or final process issued against said plaintiff, and

Fifth, The actual value of the property. When several articles are claimed, the value of each article shall be stated as nearly as practicable.

(165.) The justice shall not issue a summons until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the justice, an undertaking in not less than double the value of the property, as stated in the affidavit, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages that may be awarded against him, and if the property be delivered to him that he will return the same to the defendant, if a return thereof be adjudged.

(166.) Upon such affidavit and undertaking being executed and filed with the justice, he shall issue a summons as in other cases, but in addition commanding the constable immediately to seize and take into his custody, wherever they may be found in the county, the goods and chattels mentioned in the affidavit, deliver the same to the plaintiff.

(167.) What is a sufficient description of the property required to be replevied must, in a large measure, depend upon each particular case. Technical accuracy is not desired, and in general the degree of precision demanded must be such as will inform a man of fair judgment and enable him readily to identify the property with reasonable certainty.

(168.) A variance between the description of the property in the affidavit and that in the writ is immaterial, where no room remains for doubt and where the right property was taken on the writ.

(169.) Where a party wishes to avail himself of objections to the affidavit, he must do so in reasonable time, and not for the first time after trial and verdict, or on appeal. At any time before trial, or on trial, an affidavit in replevin may be amended where an amendment will be in furtherance of justice, but the court may impose the payment of reasonable costs as a condition of making the amendment. And even an appeal to the district court the affidavit in replevin may there be amended, if its defects are not of such a fatal nature as to make it a nullity.

(170.) When the writ of replevin is delivered to the constable he shall execute the same by taking the property therein mentioned. He shall also deliver a copy of the summons to the person charged with the unlawful detention of the property, or leave such a copy at his usual place of residence, and shall make return of the time and manner of service, and any undertaking taken by him.

(171.) The writ is the officer's authority for the seizure, making it his imperative duty to take the goods described therein and only those. The defendant for refusing to deliver the property will not be in contempt of court, nor has the court authority to issue an order compelling him to deliver it, where the return of the officer shows such a refusal; the officer himself has power to take the property under the writ.

(172.) The officer is not empowered to take the property from the possession of any person except the one named in the writ.

(173.) If within twenty-four hours after service of the summons, there is executed, by one or more sufficient sureties of the defendant, to be approved by the constable, an undertaking to the plaintiff, in not less than double the amount of the value of the property, as stated in the affidavit of the plaintiff, to the effect that the defendant will deliver the property to the plaintiff if such delivery be adjusted, and will pay all costs and damages that may be awarded against him, the constable shall return the property to the defendant. If such undertaking be not given within twenty-four hours after the service of the order, the constable shall deliver the property to the plaintiff.

(174.) The plaintiff may, within twenty-four hours from the time the undertaking mentioned in the preceding section is given by the defendant, give notice to the constable that he excepts to the sufficiency of the sureties. If he fails to do so he must be deemed to have waived all objections to them. When the plaintiff excepts the sureties must justify, upon notice, as

bail on arrest. The constable shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify.

(175.) The affidavit of the plaintiff, as to the value of the property, shall fix the jurisdiction of the justice so far as such value is concerned; but the value of the property shall not be assessed against the defendant at a greater amount than that sworn to by the plaintiff in his affidavit.

(177.) If the property has been delivered to the plaintiff, and he fails to prosecute his action to final judgment, the justice cannot peremptorily enter a judgment in the case. But, upon the application of the defendant or his attorney, the justice must impanel a jury to inquire into the right of property, and the right of possession of the defendant to the property taken. If the jury shall be satisfied that the said property was the property of the defendant at the commencement of the action, or if the jury be satisfied that the defendant was entitled to the possession at such time, they shall find accordingly, and shall further find the value of such property, or the value of the possession thereof, and any damage for withholding the same as may be just and proper.

(178.) In all cases when the property has been delivered to the plaintiff, when the jury shall find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit, and, if they find either in his favor, they shall also find the value of the property, or the value of the possession, and such damages for withholding said property as may be just and proper.

(179.) The judgment in the case mentioned in the two preceding sections shall be the return of the property, or for the value thereof, or the value of the possession of the same, in case a return cannot be had, and for damages for withholding said property, and the costs of suit.

(180.) In all cases when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff on the trial, or on inquiry of damages they shall assess adequate damages to the plaintiff for the illegal detention of the property, for which, with costs of suit, the justice shall render judgment against the defendant.

(181.) When the property claimed has not been taken, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as may be right and proper.

(182.) The constable, in executing the writ, may break open any building or inclosure in which the property claimed or any part thereof, is concealed; but not until he has been refused an entrance into said building or inclosure, and the delivery of the property, after having demanded the same.

(183.) Whenever it shall be made to appear to the satisfaction of the justice, by the affidavit of the plaintiff, or otherwise, that the defendant, or any other person, knowingly conceals the property sought to be recovered, or, having control thereof, refuses to deliver the same, the justice should forthwith issue a subpoena commanding the party charged with concealing the property to appear before the said justice to tes-

tify in reference thereto. If the party so subpoenaed neglects or refuses to obey the subpoena and fails to appear, the justice should then issue an attachment for him, the same as in case of a defaulting witness, and place said attachment in the hands of the constable to be served. When the party so subpoenaed refuses to obey the subpoena and fails to appear, the justice should then issue an attachment for him, the same as in case witness to truly answer the questions to the best of his knowledge and ability. If he refuse to be sworn or to affirm, or after having been sworn or affirmed, refuses to answer the proper questions asked him in reference to the property sought to be recovered, the justice may commit such defendant, or other person, until he or they agree to truthfully answer the questions as to the whereabouts of the property, or agree to deliver the same to the officer, or until he or they are duly discharged therefrom by law.

(184.) If any justice shall issue a writ to replevin property, as is provided by law, without the affidavit and undertaking being executed, and filed in his office, as is provided by the statute. the same shall be set aside at his costs, and he shall be liable. in damages, to the party injured.

CHAPTER XI.

APPEAL.

185. Wherein appeal does not lie.
186. Appeal bond.
187. Method of appeal by municipality.
188. Case must be certified to district court within twenty days from judgment.
189. Proceedings on appeal.
190. Appellant pays costs.
191. Liability of surety.
192. When appeal is quashed.
193. New bond on appeal.
195. If justice's term expires.
196. Action against sureties.

(185.) An appeal may be taken from the final judgment of a justice of the peace in any case, except in cases hereinafter stated, in which no appeal shall be allowed: First, On judgments rendered on confession. Second, In jury trials where neither party claims in his bill of particulars a sum exceeding twenty dollars.

(186.) The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned: First, that the appellant will prosecute the appeal to effect and without unnecessary delay; and, second, that if judgment be rendered against him on appeal, he will satisfy such judgment and costs. Said undertaking need not be signed by the appellant.

(187.) When any municipality desires to appeal, no bond shall be required, and it shall be sufficient to perfect any such appeal if the appellant shall, within ten days after the rendition of the judgment cause to be filed with the justice of the peace a statement in writing that appellant does appeal from such judgment to the district court of the county, and file an affidavit setting forth the appeal is not taken for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment.

(188.) The appeal shall be complete upon the filing of the undertaking aforesaid. The justice shall immediately make out a certified transcript of his proceedings in the cause, and shall, within twenty days from the rendition of judgment, deliver or transmit the undertaking on appeal, and all the papers in the cause; all further proceedings before the justice of the peace in the case shall cease and be stayed on the filing of the undertaking with said justice; no notice of appeal shall be required, to be filed or served, and the case shall be tried de novo in the district court upon the original papers on which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed.

(189.) If the appeal be taken ten days or more before the first day of the first term of the appellate court appointed to be

held thereafter, such appeal shall be tried at such court unless continued in the same manner as other actions pending therein are continued; if the appeal be taken within ten days next preceding such term of the court, no issue of fact joined in such action shall be tried at such term, unless upon the written consent of both parties to the action; but it shall be competent for the court to hear a motion to dismiss such appeal, or any other proper motion, or to try any issue of law joined in such action, if both parties be present in person or by attorney; if the appeal be dismissed the cause shall be remanded to the justice of the peace, to be thereafter proceeded in as if no appeal had been taken; on receiving his fees in the case, the clerk of the court shall certify to the justice the order of dismissal, and he shall remit with such order all the papers received from the justice on the appeal, except the transcript and undertaking; he shall also state the amount of his fees in the case, which shall be added to the costs in the case before the justice, and collected with such other costs, and paid to the party advancing the same.

(190.) If any persons, appealing from a judgment rendered in his favor, shall not recover a greater sum than the amount for which judgment was rendered, besides cost and the interest accruing thereon, every such appellant shall pay the costs of such appeal.

(191.) When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs and damages recovered against the appellant.

(192.) When an appeal taken to the district court shall there be quashed, by reason of irregularity in taking or consumating the same, the cause for quashing shall be stated in the order of the court, and a transcript of such order shall be filed with such justice, who shall thereupon proceed to issue execution, in the same manner as if no appeal had been taken. Attorneys will therefore recognize the importance of filing a journal entry in such instances in the district court, and not to simply rely upon the entry of dismissal in the trial docket.

(193.) In proceedings on appeal, when the surety in the undertaking shall be insufficient, or such undertaking may be insufficient in form or amount, it shall be lawful for the district court, on motion, to order a change or renewal of such undertaking.

(194.) In appeals taken by the defendant in actions for the forcible entry and detention, or forcible and unlawful detention of real property, see chapter under that head.

(195.) When the term of office of a justice shall expire between the date of the judgment and the time limited for appeal, such justice may take the undertaking for appeal at any time before he has delivered his docket to his successor, and give the appealing party a transcript. After the delivery of the docket, the undertaking shall be given to his successor, and it shall be his duty to give the transcript, and do and perform all things required of his predecessor.

(196.) When final judgment shall be rendered against the appellant in the district court in any action appealed from a

justice of the peace, the court, on motion of the appellee, or any other person having an interest in such judgment, or a right to any part of the costs in such action, after ten days' notice of such motion, to be served upon appellant by copy delivered to him, may enter up judgment in the name of the appellee or his legal representatives, against the surety or sureties on the appeal bond of the appellant for the amount of such judgment and the costs, which by the terms thereof, the appellant may be required to pay. Execution may be issued on such judgment as in other cases for the use and benefit of the successful party or any person interested in such judgment, or in the costs of such action. In case the bondsmen appeal from the judgment entered upon such motion, execution shall be stayed sixty days.

CHAPTER XII.

STAY OF EXECUTIONS

197. Stay bond.
198. Length of time.
199. Wherein not allowed.
200. Execution after stay.
201. Form of executions.

(197.) Any person against whom a judgment may be rendered, except as hereinafter excepted, may have a stay of execution, for the several periods of time hereinafter mentioned, by entering into an undertaking to the adverse party, within ten days after the rendition of the judgment, have a stay of execution, for the several periods of time hereinafter mentioned, by entering into an undertaking to the adverse party, within ten days after the rendition of the judgment, with good and sufficient surety, resident of the county, such as the justice shall approve, conditioned for the payment of the amount of such judgment, interest and costs that may accrue, which undertaking shall be entered on the docket of the justice, and shall be signed by the surety; and in case execution has been issued, it shall be immediately withdrawn by said justice.

(198.) The stay of execution authorized shall be graduated as follows, namely:

First: On any judgment for twenty dollars or under, thirty days.

Second: On any judgment over twenty dollars, and not exceeding fifty dollars, sixty days.

Third: On any judgment over fifty dollars, ninety days.

(199.) No stay of execution on judgments rendered in the following cases shall be allowed:

First: On judgments rendered against justices of the peace for refusing to pay over money by them collected or received in their official capacity.

Second: On judgments against justices for not reporting all fines as required by law.

Third: On any judgment rendered against a constable for failing to make return, making a false return, or refusing to pay over money collected in his official capacity.

Fourth: On judgment against bail for the stay of execution.

Fifth: Where judgment is rendered in favor of bail who have been compelled by judgment to pay money on account of their principal.

Sixth: On judgments obtained by constables on undertakings executed to them for the delivery of property.

(200.) In cases where execution on any judgment shall be stayed, and such judgment shall not be paid or satisfied, the justice, after the stay shall have expired, shall issue an exception

on such judgment against the judgment debtor and his surety, which execution shall be in the following form:

(201.) County of ..... ss. Oklahoma to A. B., constable of ..... in said county, greeting: Whereas, C. D. on the.....day of.....190...., in an action then pending before the undersigned, a justice of the peace, recovered a judgment against E. F., for the sum of..... dollars, and the further sum of..... dollars as costs of suit: And whereas, on the ..,.....day of.....190..., G. H., entered into an undertaking, as surety for the said E. F., for a stay of execution for..... days, which time has now elapsed; and whereas, the said judgment still remains unsatisfied; Now, therefore, you are hereby commanded that of the goods and chattels of the said E. F., you cause the said judgment and costs to be satisfied as provided by law; and for want of sufficient goods and chattels of the said E. F., that you cause said judgment and costs to be satisfied out of the goods and chattels of the said G. H., and you are hereby required to make a return of this execution, with your certificate thereon, showing the manner in which you have executed the same, within thirty days from the time of your receipt hereof. Witness my hand at ....., in said county, this..... day of.....190....

J. K., Justice of the Peace.

CHAPTER XIII.

EXECUTIONS

202. Execution defined.
203. A ministerial act.
204. Not issuable after judgment has been opened.
205. Payment by anybody operates as satisfaction.
206. Death of one defendant.
207. What court must issue writ.
208. When the justice is estopped.
209. Justice has no judicial discretion.
210. Justice liable for damage.
211. When mandamus will lie.
212. Must issue execution without demand.
214. The execution.
215. Where debtors were not summoned.
216. Liability of constable.
217. Selling property under execution.
218. Justice or constable cannot purchase.
219. Constable's pay for care of live stock.
220. The constable's returns.
221. Disposing of unsold porperty.
222. Constable may take security.
223. Indemnifying bond.
224. Rights of property.
225. Proceedings.
226. Costs.
227. Sale of crops.
228. Further process.
229. Garnishment in aid of execution.
230. Execution for costs.

(202.) A writ of execution is the process by which a court carries out its judgment. It is a process for the enforcement of the payment of a judgment for money, recovered in a civil action, out of the property of the judgment debtor. There must be a judgment, order or decree to support the execution, otherwise the execution will be null and void, and will confer no authority upon the officer to whom it is directed.

(203.) The issuance of an execution is a mere ministerial act consequent upon the rendition of the judgment, and no express direction in the judgment to issue an execution is necessary.

(204.) After a judgment has been opened, an execution is not issuable. But the mere application to set aside a default judgment does not, however, have such effect.

(205.) The payment of the judgment by a stranger to the suit, unless he takes an assignment of the judgment, operates as an extinguishment and a satisfaction of the judgment, and an execution is not thereafter issuable in his behalf. Payment by a defendant likewise operates as an extinguishment of the judgment, and does not authorize him to issue an execution against his fellow-defendants for contribution; and it is immaterial whether or not such defendant takes an assignment of the judgment.

(206.) The rule of practice is well settled that if a judgment is rendered against two or more, and one defendant dies before the issuance of an execution, the execution may nevertheless be issued, and should be issued against all the defendants,

but it can be levied on the property of the survivors only, and is in fact an execution against them alone.

(207.) The writ of execution must be issued out of the court which rendered the judgment, unless the case has been appealed, or unless the record has been removed into another court, in which case the court having the record may issue the writ. Writs issued out of a justice court other than that which rendered the judgment are void. But after there has been a trial de novo on appeal from a judgment rendered by a justice of the peace, the execution is issuable on the new judgment and not on the justice's judgment.

(208.) The justice of the peace cannot issue an execution after an abstract or transcript of the judgment rendered by him has been filed with the clerk of the district court.

(209.) There is no particular form required in which the demand for an execution shall be communicated to the justice, and the demand may be either oral or written. The issuance of an execution is a ministerial duty, and if the application for the writ proceeds from a proper party, the justice has no judicial discretion to exercise, and the only inquiry he can make is whether the record of the court shows a judgment authorizing the issuance of the writ.

(210.) The failure of a justice to issue an execution upon the demand of the proper party, or in compliance with his statutory duty, is a breach of his official bond, and he is liable for any loss occasioned by his neglect. The justice is likewise liable for such injury as may result from the nonconformity of the execution to the judgment, or from other formal defects or irregularities in the execution.

(211.) The issuance of an execution by a justice of the peace calls only for the exercise of a ministerial function especially enjoined on him by law as a duty resulting from his office, and if he refuses to issue the writ, the creditor is entitled to a writ of mandamus to compel him to perform his duty.

(212.) Execution for the enforcement of a judgment before a justice of the peace may issue by the justice before whom the judgment was rendered, or by his successor in office, on the application of the party entitled thereto at any time within five years from the entry of the judgment or the date of the last execution issued thereon.

(213.) It shall be the duty of the justice, if the case be not appealed, taken up on error, docketed in the district court, or bail has not been given for the stay of execution, at the expiration of ten days from the entry of the judgment, to issue execution without a demand, and proceed to collect the judgment, unless otherwise directed by the judgment creditor.

(214.) The execution must be directed to a constable of the county and subscribed by the justice by whom the judgment was rendered, or by his successor in office, and must bear date the day of its delivery to the officer to be executed; it must intelligibly refer to the judgment by stating the names of the parties, and the name of the justice before whom, and of the county and township where, and the time and when it was rendered; the amount of the judgment, and, if less than the whole is due, the true amount due thereon. It must require the constable substantially as follows:

First: To collect the amount of the judgment out of the personal property of the debtor, and pay the same to the party entitled thereto.

Second: If it be a case where any of the judgment debtors are certified on the docket as surety, it shall command that the money be made of the personal property of the principal debtor, and, for want thereof, of the personal property of the principal, subject to execution within the jurisdiction, shall be exhausted before any of the property of the surety shall be taken in execution.

Third: It must, in all cases, direct the officer to make return of the execution, and a certificate thereon, showing the manner in which he has executed the same, in thirty days from the time of his receipt thereof.

(215.) Upon an execution of a judgment against debtors, upon one or more of whom the summons was not served, the execution must contain a direction to collect the amount of the joint property of the person upon whom the summons was served, to be specified by name.

(216.) A constable is liable to a party in whose favor an execution has been issued to him, for the amount thereof, in the following cases:

First: Where he suffers thirty days to elapse without making a return thereof to the justice, and paying to him or the party entitled, the money collected thereon by him.

Second: When he wilfully and carelessly omits to levy on property within thirty days.

(217.) All property taken on execution, under an execution issued by a justice of the peace, shall be advertised for sale at four of the most public places in the township where such property was seized, at least ten days previous to the time appointed for such sale, which sale shall be held between the hours of ten o'clock A. M., and four o'clock P. M., at the house or on the premises where such property was taken, or at one of the most public places in the township.

(218.) It shall not be lawful for any justice of the peace who issued the execution, or for the constable holding the execution, to purchase, either directly or indirectly, any property sold on such execution; and any justice or constable who shall so do, shall forfeit and pay for every such offense, any sum not exceeding one hundred dollars nor less than five dollars, to be recovered by civil action in the name of the State of Oklahoma, before any court having jurisdiction thereof, for the use of the county where such offense was committed, and shall, moreover, be liable to the action of the party injured thereby.

(219.) When any cattle or live stock shall be taken on execution, it shall be the duty of the justice of the peace who issued the execution, or other justice charged with the duty of collecting the judgment whereon such execution issued, to allow the constable, for keeping the same, a reasonable compensation, to be taxed and collected as costs in the suit.

(220.) When a constable shall levy on and sell any goods and chattels, he shall make out and annex to his return to the execution, in virtue of which sale was made, a true inventory of all such property and of each article thereof, and the price at

which the same was sold; and for each and every neglect to return a true and accurate schedule or inventory of property sold, or remaining unsold for want of bidders, or other just cause, and, if sold, the price at which the same was sold, each and every constable guilty of such neglect shall forfeit and pay, on conviction thereof, any sum not exceeding one hundred dollars, to be recovered by action in the name of the State of Oklahoma, for the use of the party injured thereby, to be prosecuted before any court having cognizance thereof.

(221.) Where a constable shall have levied on any goods and chattels which remain unsold for want of bidders, or any other just cause, it shall be his duty to return with the execution a schedule of all such goods and chattels; and the justice shall, unless otherwise directed by the party for whom such execution issued, or his agent, immediately thereafter issue an order, thereby commanding any constable to whom the same may be directed or delivered, to expose such property to sale; which sale and the proceeding thereon shall be the same as if such property had been sold on the original execution.

(222.) Any constable having levied on goods and chattels of which he permits the party against whom the execution issued to retain the possession, is authorized to take such security for his own indemnity as he may require, that such property shall be delivered at the time and place appointed for the sale thereof.

(223.) If the constable, by virtue of any attachment or execution, shall levy the same on any goods and chattels claimed by any person other than the defendant, or be requested by the plaintiff to levy on such goods and chattels, the officer may require the plaintiff to give him an undertaking, with good and sufficient sureties, to pay all costs and damages he may sustain by reason of the detention or sale of such property; and until such undertaking shall be given, the officer may refuse to proceed as against such property.

(224.) When a constable shall levy on or attach property, claimed by any person or persons, other than the party against whom the execution or attachment issued, the claimant or claimants shall give three days' notice, in writing, to the attachment or execution creditor, his attorney or his agent, or if not found within the county, then such notice shall be served by leaving a copy thereof at his usual place of abode in such county, of the time and place of the trial of the right to such property, which trial shall be had before some justice of the township, at least one day prior to the time appointed for the sale of such property.

(225.) If, on the trial, the justice shall be satisfied, from the proof, that the property, or any part thereof, belongs to the claimant, or claimants, such justice shall render judgment against the party in whose favor such execution or attachment issued for the costs, and issue execution therefor, and shall, moreover, give a written order to the constable, who levied on, or who may be charged with the duty of selling such property, directing him to restore the same, or so much thereof as may have been found to belong to such claimant or claimants: Provided, that either party may at, or before the time of trial, call for a jury, and in that case, the mode of drawing, and all proceedings there, shall be conducted in all respects as is provided for trial by jury, before justices of the peace.

(226.) But if the claimant or claimants fail to establish his or their right to such property, or any part thereof, the justice shall render judgment against such claimant or claimants for the costs that have accrued on account of such trial, and issue execution therefor; and the constable shall not be liable to the claimant or claimants for the property so taken.

(227.) In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied or attached by virtue of any execution, attachment or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process was not issued, shall not be affected thereby, but the same may be sold, subject to the claim or interest of the landlord or tenant against whom such process did not issue.

(228.) In cases where the constable shall make it appear, to the satisfaction of the justice, that he has been deprived of an opportunity of levying an execution within the time prescribed, or otherwise prevented from making the whole of the money therein required to be made, and shall make return to the justice who issued the same to that effect, such justice is authorized and required to issue further process of execution for the amount of balance remaining unsatisfied, which shall be served and returned in all respects as other executions are.

(229.) When an execution issued by a justice of the peace shall have been returned unsatisfied, the judgment creditors, his agent or attorney, may file an affidavit with the justice, setting forth that he has good reason to and does believe that any person or corporation to be named, and within the county, has property of the defendant, or is indebted to him and thereupon the justice shall issue to said party or corporation a garnishee summons, and the proceedings shall be the same as those laid down in this work in the chapter on garnishment.

(230.) Upon the return of an execution issued from a justice's court, and returned unsatisfied by the constable to whom it is issued, or when execution has been withheld by order of the plaintiff for a period of ninety days, the justice may, on his own motion, or on application of any party interested in the costs of the action, issue execution against the plaintiff in said action for the costs made by said plaintiff.

CHAPTER XIV.

FORMS

231. Notice in forcible entry.
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260. Notice of opening judgment.
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262. Certificate of transcript
263. Abstract of judgment .
264. Execution, general form.
265. Bill of sale.

FORCIBLE ENTRY AND DETAINER.

Notice Before Bringing Suit.

(231.) .....of Oklahoma, ...County ss.

NOTICE.

To Richard Roe: You are hereby notified to quit, leave, vacate and deliver up to me the premises described as follows: (Here describe the property accurately); for the possession of which I will bring suit after three days under the Forcible Entry and Detainer Act, unless you comply with the demands of this notice. You will govern yourself accordingly.

Witness my hand this..... day of..... 19....

John Doe.
Owner of said premises.

Affidavit of Service of Notice.

(232.) A. B., being duly sworn according to law, duly states upon oath that he served a true copy of the foregoing notice upon the person therein named by leaving same on the premises therein described, with ....., a person over the age of twelve years, on the..... day of..... 19....

A. B.

Subscribed and sworn to before me, on this..... day of ..... 19....

C. D.
Justice of the Peace.

Complaint in Forcible Entry and Detainer.

(233.) In the justice court of C. D., a justice of the peace in and for ....., township, ... county, Oklahoma.

John Doe, plaintiff vs. Richard Roe, defendant, complaint.

Comes now the plaintiff, and complaining of the defendant, says: That he is the owner, and is entitled to the immediate possession of the following described premises: (Here describe the property fully and accurately.)

That said defendant did on or about the..... day of..... 19...., make forcible and unlawful entry of said premises, and has ever since forcibly and unlawfully detained same from this plainiff; (or that defendant made lawful entry thereof, but unlawfully and forcibly detains the same, and has unlawfully and forcibly detained the same since the..... day of ..... 19...., stating fully the facts constituting the unlawful and forcible detention.)

That said plaintiff served due notice on said defendant to leave, vacate and quit the said premises, more than three days prior to the filing of this complaint, as is shown by a copy of said notice, which is hereto attached to this complaint, marked "Exhibit A," and made a part hereof.

Wherefore plaintiff prays that he may have restitution of said premises as aforesaid, and that he recover from said defendant the sum of $....., his damages sustained by said forcible and unlawful entry and detention, and the costs of this suit.

JOHN DOE,
By I. Z. attorney for plaintiff.

John Doe being first duly sworn, according to law, deposes and says: That he is the plaintiff named in the foregoing complaint; that he has read the foregoing complaint, and the statements therein set forth are true. JOHN DOE.

Subscribed and sworn to before me this ..... day of ..... 19....
C. D.
Justice of the peace.

Summons in Forcible Entry and Detainer.

(234.) ..... of Oklahoma, ... county ss.

SUMMONS

John Doe, plaintiff vs. Richard Roe, defendant.

To ..... constable of ..... township ..... county, Oklahoma.

You are hereby commanded to summons Richard Roe to appear at the justice court of ....., in .....township, in said county, on the ..... day of ..... A. D., 19...., at ..... o'clock, in the .....noon, to answer the complaint of John Doe. The plaintiff asks judgment of restitution of (here describe the premises) and for damages to the amount of $..... And you are further commanded to make due return of this writ on the ..... day of ..... 19....

Witness my hand this ..... day of ..... 19....
C. D.
Justice of the Peace.

Execution in Forcible Entry and Detainer.

(235.) ..... of Oklahoma, ... County ss.

The ..... of Oklahoma to any constable of..... county:

Whereas, in a certain action for the forcible and unlawful entry and detention (or the forcible and unlawful detention, as the case may be), of the following described premises, to-wit: ..... lately tried before me, wherein ..... was plaintiff and ..... was defendant, judgment was rendered on the ..... day of ..... 19...., that the plaintiff have restitution of said premises; and also that he recover costs in the sum of $..... You are therefore commanded to cause the defendant to be forthwith removed from said premises, and the said plaintiff to have restitution of the same; also that you levy of the goods and chattels of the said defendant, and make the costs aforesaid, and all accruing costs, and of this writ make legal service and due return.

Witness my hand this ..... day of ..... 19....

.....
Justice of the Peace.

Appeal Bond in Forcible Entry and Detainer.

(236.) ..... of Oklahoma, ... County.

APPEAL BOND.

Witness all by these presents: That Richard Roe, as principal and John Smith and Peter Jones as sureties, are held and firmly bound unto John Doe in the sum of $..... for the payment of which well and truly to be made, we bind ourselves, our heirs and executors. The condition of this obligation is such, that whereas said Richard Roe has appealed from a judgment of C. D., justice of the peace for ..... township, in said county, in an action for forcible and unlawful entry and detainer, in which said John Doe was plaintiff and Richard Roe defendant; now therefore, if said Richard Roe, appellant, shall not commit or suffer waste to be committed upon the premises in controversy, to-wit, (Description of premises); and if, upon further trial of said cause, judgment be rendered against said appellant, he shall pay to John Doe double the value of the use and occupation of said property from the date of this undertaking, to be determined by the court, and all damages and costs that may be awarded against said Richard Roe, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this..... day of ..... 19....

RICHARD ROE.
JOHN SMITH.
PETER JONES.

Qualifications of Sureties.

Comes now ..... and upon his oath says he is worth $..... over and above all his debts, liabilities and exemptions of whatsoever character.

Subscribed and sworn to before me on this ..... day of ..... 19....

.....
Justice of the Peace.

(Each surety should qualify.)

BILL OF PARTICULARS.

(237.) ..... of Oklahoma, ... County, ss.

Before John Smith, justice of the peace for ..... township.

John Doe, plaintiff vs. Richard Roe, defendant; bill of particulars.

Comes now the plaintiff and for his cause of action against the defendant, alleges:

That the defendant is indebted to him in the sum of $..... for work and labor performed by the plaintiff for the defendant, at the instance and request of the defendant, as follows: (Here give, time, items and amounts;), or, as shown by an itemized statement thereof, which is hereto attached, marked "Exhibit A," and made a part of this bill of particulars. That said debt is just, due and unpaid, and there are no credits or offsets thereon.

Wherefore plaintiff prays judgment against said defendant for $..... with costs of this suit, together with a reasonable attorney fee.

.....
Attorney for Plaintiff.

John Doe, of lawful age, being duly sworn according to law, deposes and says: That he is the plaintiff above named, and that the allegations therein contained in plaintiff's bill of particulars are true.

JOHN DOE.

Subscribed and sworn to before me this ..... day of ..... 19....

JOHN SMITH,
Justice of the peace.

Goods Sold and Delivered.

(238.) (Caption.)

Comes now plaintiff and for his cause of action alleges, that defendant is indebted to plaintiff in the sum of $..... for goods, wares and merchandise sold and delivered to defendant by the plaintiff at defendant's request, an itemized account of the same being attached hereto, marked "Exhibit A," and made a part hereof. That the defendant has refused and wholly neglected to pay for the same. That said claim is due, just and unpaid, and there are no credits or setoffs thereon.

Wherefore plaintiff prays judgment against the defendant for $..... and costs of his suit .

A. B., Attorney for Plaintiff.

For Rent.

(239.) (Caption.)

Comes now plaintiff and for his cause of action alleges, that defendant is indebted to him in the sum of $..... for rent of (Here describe the property rented and time for which rent is due.) That said claim is just, due and wholy unpaid.

Wherefore plaintiff prays judgment in the sum of $..... together with the costs of this action.

A. B., Attorney for Plaintiff.

On Promissory Note.

(240.) (Caption.)

Plaintiff, for his cause of action, alleges that the said defendant, on the ..... day of ..... 19...., at ..... made his promissory note in writing, and then and there delivered the same to the plaintiff, for value received, whereby he promised to pay the plaintiff, or order, the sum of $....., ninety days after the date thereof, with interest at the rate of ..... per cent per annum from date (or maturity), until paid, a copy of said note being attached hereto, marked "Exhibit A," and made a part hereof. That said note is now due and wholly unpaid; wherefore plaintiff asks judgment for the amount of said note and interest, together with costs of suit.

A. B., Attorney for Plaintiff.

Suit Against Indorser of Note.

(241.) (Caption.)

Plaintiff for his cause of action against the defendant, Richard Roe, says: That one John Adams did, on the ..... day of ..... 19...., at ....., make his promissory note, a true copy of which is attached hereto, marked "Exhibit A," and made a part hereof, whereby he promised to pay to the defendant, Richard Roe, or order, the sum of ..... dollars, at the rate of ..... per cent per annum interest, for value received, three months after the date thereof.

That the said defendant, Richard Roe, then and there indorsed the said note to one John Andrews, who then and there indorsed and delivered the said note to the plaintiff.

That the said John Adams did not pay the amount of said note, nor any part thereof, although the same was duly presented to him for payment on the day when it became due, of all which the defendant then and there had due notice.

That said note is now due and wholly unpaid; wherefore plaintiff asks judgment for the amount thereof, and the interest thereon, and the costs of this action.

A. B., Attorney for Plaintiff.

Payee of Check Against Drawer.

(242.) (Caption.)

Plaintiff for his cause of action states that the said defendant, on the ..... day of ....., 19...., at ..... made his draft, or order in writing, called a check, and directed the same to the ..... Bank, of ..... in the city of ....., state of ....., and thereby requested said bank to pay the plaintiff, or bearer, $....., and delivered the same to plaintiff for value received. That plaintiff presented said check to said bank for payment, within a reasonable time, and during the business hours of said bank, to-wit on the ..... day of ..... 19...., but said bank refused to pay the same, or any part thereof. That said defendant had due notice thereof. That said check has not been paid, nor any part thereof.

Whereof plaintiff asks judgment for the amount of the same, with the interest due thereon, and for costs of this action.

A. B., Attorney for Plaintiff.

Bill of Particulars for Breach of Warranty of the Soundness of a Horse.

(243.) (Caption.)

Plaintiff for his cause of action against the defendant alleges: That the said defendant, on or about the ..... day of ..... 19...., in consideration that the plaintiff would buy a certain horse for the sum of $75.00 from the said defendant, undertook and promised that the said horse was sound. That the plaintiff, relying on said warranty of the said defendant that said horse was sound, bought the said horse of the said defendant, and paid him therefor the sum of $75.00.

That the said horse, at the time of said purchase by the plaintiff, was not sound, contrary to the said promise and undertaking of the said defendant. and that said horse at that time was (Here specify the nature of the unsoundness of the horse); and that the plaintiff was deceived by the said promise and undertaking of the said defendant. That plaintiff incurred heavy charges and expenses in keeping and feeding said horse, and in having said horse examined and taken care of, and in matters incidental thereto, and that said horse is of no value to the plaintiff.

That the plaintiff has sustained damages to the amount of $99.00 by the said breach of warranty by the said defendant.

Wherefore plaintiff asks judgment for the said sum of $99.00 and costs of suit.

A. B., Attorney for Plaintiff.

Undertaking for Costs.

(244.) (Caption.)

We, John Doe, as principal, and John Smith and Peter Jones as sureties, hereby undertake and promise to pay all costs for which the plaintiff may be legally liable, in this action, and also to pay the same if the costs cannot be collected from the defendant.

Witness our hands this ..... day of ..... 19....

JOHN DOE.
JOHN SMITH.
PETER JONES.

Affidavit for Continuance.

(245.) (Caption.)

John Doe being duly sworn, deposes and says: That he is the (Here insert either plaintiff, defendant, attorney or agent of either, as the case may be) above named; that he cannot safely proceed to trial at this time, for the want of material testimony, which he has with due diligence been unable to procure He therefore asks that the trial be adjourned for fifteen days from this date.

JOHN DOE.

Subscribed and sworn to before me on this ..... day of ..... 19....

....

Affidavit for Change of Venue.

(246.) (Caption.)

Comes now ..... (defendant, plaintiff, or agent or attorney for either as case may be) above named, and being

duly sworn upon his oath says that he believes the justice before whom said cause is pending is biased and prejudiced against him, and that he cannot have a fair trial before him, (or that the justice is a material witness in the case), wherefore he asks that said cause he sent to some other justice of the peace for trial.

(Signature).....

Subscribed and sworn to before me on this ..... day of ..... 19....

ATTACHMENT AFFIDAVIT.

(247.) ..... of Oklahoma, ... County, ss.

Before ..... justice of the peace of ..... township.

John Doe, plaintiff vs. Richard Roe, defendant; attachment affidavit.

John Doe being duly sworn, upon his oath says: That he is plaintiff in the above entitled action; that said plaintiff has commenced said action against said defendant for the recovery of ..... and ..... dollars; that the defendant is indebted to said plaintiff in said sum; that said claim is just and due, and is wholly unpaid.

(1.) That said defendant is a foreign corporation; that said defendant is a non-resident of this territory; that the cause of action against defendant arose wholly within the limits of this territory; said cause of action is one arising on.....

(2.) That said defendant has absconded with the intention to defraud his creditors.

(3.) That said defendant has left the county of his residence to avoid the service of summons.

(4.) That said defendant so conceals himself that a summons cannot be served upon him.

(5.) That said defendant is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors.

(6.) That said defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors.

(7.) That said defendant has property or rights in actions which he conceals.

(8.) That said defendant has assigned, removed or disposed of, or is about to dispose of his property, or a part thereof, with the intent to defraud, hinder or delay his creditors.

(9.) That said defendant fraudulently contracted the debt, fraudulently incurred the liability or obligation for which this action is brought.

(10.) That the damages for which this action is brought are for injuries arising from .....

(11.) That said defendant has failed to pay the price and value of said articles and things delivered, which, by said contract he was bound to pay upon said delivery.

.....

Subscribed and sworn to before me, this ..... day of ..... 19....

.....
Justice of the Peace.

Note: The above contains all the grounds for attachment. Omit those not existing in the particular case.

Order of Attachment.

(248.) ..... of Oklahoma, ... County, ss.

Before ....., a justice of the peace for ..... township.

John Doe, plaintiff vs. Richard Roe, defendant.

The ..... of Oklahoma to any constable of said county, greeting:

You are hereby commanded to attach and safely keep the goods, chattels, stocks, interests in stocks, rights, credits, moneys and effects of the defendant, not exempt by law from being applied to the payment of the claims of said plaintiff, or so much thereof as will satisfy his claim for ..... dollars, and ..... dollars, the probable costs of this action. You will make due return of this order on the ..... day of ..... 19.... days after date.

Witness my hand at my office in ..... this the ..... day of ..... A. D., 19....

.....
Justice of the peace.

Undertaking in Attachment.

(249.) (Caption.)

We, John Doe, as principal, and John Smith and Peter White, as surety, do hereby bind ourselves to Richard Roe, defendant in said action, in the sum of ..... dollars, that the plaintiff shall pay to defendant all damages which he may sustain by reason of the attachment in this action if the order therefor be wrongfully obtained.

Witness our hands this ..... day of ..... 19....

JOHN DOE.
JOHN SMITH.
PETER WHITE.

Subscribed before me, and approved this ..... day of ..... 19....

.....
Justice of the Peace.

Affidavit Denying Grounds of Attachment.

(250.) (Caption.)

Richard Roe, of lawful age, being first duly sworn, says: That he is the defendant above named, and he further denies the grounds laid for the attachment by the plaintiff herein, and asks that the same be discharged.

RICHARD ROE.

Subscribed and sworn to before me this ..... day of ..... 19....

.....
Justice of the Peace.

Bond to Discharge Attachment.

(251.) ..... of Oklahoma, ... County, ss.

Whereas John Doe has commenced a civil action against Richard Roe, in the court of ..... a justice of the peace in and for ..... township, in county and territory aforesaid; and, whereas, an order of attachment has been issued in said action, and the property of the said Richard Roe has been attached and is now bound therefor, which property the constable of ..... township now returns to the said Richard Roe, defendant in said action. Now therefore we, Richard Roe, as principal, and A. B. and C. D., as sureties, do hereby bind ourselves firmly to the said John Doe, plaintiff, in the sum of ..... dollars (double the amount of plaintiff's claim.)

The condition of this obligation is such that if the said defendant shall well and truly discharge and perform the judgment of the court in this action, then this obligation to be void, otherwise to remain in full force and effect.

(Signatures.)

This undertaking approved by me this ..... day of ..... 19....

.....

Justice of the Peace.

AFFIDAVIT IN GARNISHMENT.

(252.) ..... of Oklahoma, ... County, ss.

Before ..... justice of the peace for ..... township.

John Doe, plaintiff vs. Richard Roe, defendant.

John Doe, being duly sworn, says he is the plaintiff, (or is the judgment creditor) in the above entitled action; that this affiant has good reason to and does believe that A. B., within said county of ....., has property, money, goods, chattels, credits and effects in his hands and under his control belonging to said defendant, described as follows: (Description), and is indebted to said defendant; that said defendant, Richard Roe, is justly indebted to plaintiff in the sum of ..... dollars over and above all legal setoffs, and that said plaintiff has good reason to and does believe that he will lose the same unless a garnishee summons issue to the aforesaid A. B.

JOHN DOE.

Subscribed and sworn to before me on this ..... day of ..... 19....

.....

Justice of the Peace.

Garnishment Summons.

(253.) (Caption.)

..... of Oklahoma to A. B., garnishee:

You are hereby summoned, pursuant to the affidavit filed herein, as garnishee of the defendant, Richard Roe, and required on or before the date of return day, the ..... day of ..... 19.... at .... o'clock in the ..... noon of said day, to answer according to law whether you are indebted to, or have in your possession or under your control, any personal property belonging to said defendant, and file a copy of your answer with the undersigned justice of the peace; and in case of your failure

so to do you will be liable to further proceedings according to law. Of which the said defendant will also take notice.

Witness my hand this ..... day of ..... 19....

.....

Justice of the Peace.

Affidavit in Replevin.

(254.) ..... of Oklahoma, ... County, ss.

Before ..... a justice of the peace for ..... township.

John Doe, plaintiff vs. Richard Roe, defendant.

John Doe, being duly sworn, says that he is the owner of and entitled to the immediate possession of the following described property of the actual value as follows, to-wit: (Here accurately describe each article, and give the value of each article). All of the aggregate value of ..... dollars; that the said property is wrongfully detained from him by the defendant, Richard Roe, and that said property was not taken in execution on any order or judgment against said John Doe, or for the payment of any tax, fine or amercement assessed against him, or by virtue of any order of delivery issued in replevin, or any other mesne or final process issued against him. (If it be for exempt property taken on execution, "that said property was taken in execution on a judgment rendered in favor of ..... against said plaintiff, and that the same is exempt by law from being so taken.")

JOHN DOE.

Subscribed and sworn to before me, this ..... day of ..... 19....

.....

Justice of the Peace.

Replevin Bond.

(255.) ..... of Oklahoma, ... County, ss.

Know all men by these presents: That we, John Doe, as principal, and Peter Smith, as surety, are firmly bound unto Richard Roe in the penal sum of $..... for the payment of which well and truly to be made, we and each of us respectively bind ourselves, our heirs, executors and administrators firmly by these presents: The condition of the above obligation is such, that, whereas, said John Doe has commenced an action in the justice court of ..... township, ... county, Oklahoma, before A. B., a justice of the peace of said township, against Richard Roe, to recover possession of the following described personal property, to-wit: (Description), and for $..... damages for the wrongful detention of the same; and said property has been seized by a constable of said county on an order issued out of said court for that purpose, and is now in his possession.

Now, therefore, if the said John Doe shall prosecute his said action with effect, and will return the said property to the said Richard Roe, if return thereof be adjudged by the court, and shall pay to the said Richard Roe all costs and damages which may be awarded against him in said action for any cause what-

ever, then this action to be void, otherwise to remain in full force and effect.

Witness our hands and seals this ..... day of ..... 19....

JOHN DOE.
PETER SMITH.

(Surety should qualify.)

The foregoing undertaking and surety approved by me this ..... day of ..... 19....

.....
Justice of the Peace.

Redelivery Bond in Replevin.

(256.) Know all men by these presents: That we, Richard Roe, as principal, and John Jones, as surety, are firmly bound unto John Doe in the penal sum of $....., for the payment of which well and truly to be made, we and each of us respectively bind ourselves, our heirs, executors and administrators firmly by these presents. The conditions of the above obligation is such, that, whereas, said John Doe has commenced an action in the justice court before A. B., justice of the peace in and for ..... township, ...-..... county, Oklahoma, against Richard Roe, to recover possession of the following described personal property, to-wit: (Description), and for $..... damages for the wrongful detention of the same; and said property has been seized by a constable of the county on an order issued out of said court for that purpose and is now in his possession. Now, therefore, if the said Richard Roe shall safely keep the property above described, so that it shall not be in any way injured or damaged, and shall deliver the same to said John Doe, if judgment shall be rendered to that effect in said action, and also that he will pay to John Doe all costs and damages that may be adjudged against him by said court, then this action to be void, otherwise to remain in full force and effect.

Witness our hands and seals this ..... day of ..... 19....

RICHARD ROE.
JOHN JONES.

(Surety should qualify.)

The foregoing undertaking and sureties approved by me this ..... day of ..... 19....

.....
Constable.

Notice of Exception to Surety.

(257.) (Caption.)

To A. B., constable of ..... township, in said county:

I hereby except to the surety this day approved by you in behalf of the defendant, Richard Roe, in said cause.

JOHN DOE, Plaintiff.

Replevin Summons.

(258.) (Caption.)

The ..... of Oklahoma to the sheriff, or any constable in said county:

You are hereby commanded to summon Richard Roe to appear before me, the undersigned justice of the peace, at my office, in ....., in ..... county ..... Oklahoma, on the ..... day of ..... 19...., at ..... o'clock ..... M., to answer the action of John Doe for wrongfully detaining the following described goods and chattels belonging to the said plaintiff, to-wit: (Description and value), and immediately seize and take into your custody, wherever they may be found in the county, the said goods and chattels and deliver the same to the said plaintiff. And then and there return this writ.

Witness my hand at ....., this ..... day of ..... 19....

.....
Justice of the Peace.

Affidavit for Opening Default Judgment.

(259.) .....of Oklahoma, ... County, ss.

Before A. B., justice of the peace for ..... township.

John Doe, plaintiff vs. Richard Roe, defendant; affidavit.

Richard Roe, defendant above named, being duly sworn, says that he has a just and valid defense to the whole (or if a part, state what that part consists of) of the plaintiff's claim in the above entitled action, wherein judgment was in his absence rendered against him on the ..... day of ..... 19...., for the sum of $..... and costs of suit. The defendant hereby confesses judgment for the costs awarded against him and asks that the judgment in this case be set aside.

RICHARD ROE.

Subscribed and sworn to before me this ..... day of ..... 19....

.....
Justice of the Peace.

Notice of Opening Judgment.

(260.) (Caption.)

Said plaintiff is hereby notified that the judgment in the above entitled action has been opened, and that the trial of said action will be had before the above named justice of the peace at his office on the ..... day of..... 19...., at ..... o'clock ..... M.

RICHARD ROE,
Defendant.

Dated at ..... this ..... day of ..... 19....

Appeal Bond.

(261.) ..... of Oklahoma, ... County, ss.

Know all men by these presents: That Richard Roe, as principal, and John Jones and Peter Smith as sureties, are held and firmly bound unto John Doe in the sum of $....., for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents;

The condition of the above obligation is such, that, whereas, the said Richard Roe intends to appeal to the district court, within and for said county, from a judgment rendered against him, in favor of John Doe, in the justice court of said county

of ..... on the ..... day of ..... 19...., at ..... in said county. Now if the said Richard Roe, appellant, shall pay the amount of the said judgment appealed from, including all the costs, if the said appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in said action in the district court, then this obligation to be void, otherwise to remain in full force.

Witness our hands and seals this ..... day of ..... 19....

RICHARD ROE.
JOHN JONES.
PETER SMITH.

..... of Oklahoma, ... County, ss.

Personally appeared before me, justice of the peace within and for ..... township, county and ..... aforesaid, John Jones and Peter Smith, the undersigned, sureties on the above undertaking, and each for himself, on oath, stated that he is a resident and freeholder of said county and ....., and that he has property of the value of $..... over and above all his debts, liabilities and all exemptions allowed by law. And the said John Jones and Peter Smith further state on oath that their said property consists of (here give brief inventory of it.)

JOHN JONES.
PETER SMITH.

Subscribed and sworn to before me this ..... day of ..... 19....

.....
Justice of the Peace.

The above undertaking and sureties taken and approved by me this ..... day of ..... 19....

.....
Justice of the Peace.

Certificate of Transcript.

(262.) (Caption.)

I, A. B., justice of the peace for ..... township in said county, do hereby certify that I have compared the foregoing transcript of the record of my docket with the original thereof recorded in my court, and that the same is a true, full and exact copy thereof.

Witness my hand as said justice of the peace this ..... day of ..... 19....

.....
Justice of the Peace.

Abstract of Judgment.

(263.) (Caption.)

..... 19...., judgment entered for plaintiff, John Doe, debt $.....; costs $..... I hereby certify that the foregoing is a full and correct abstract of a judgment rendered by me in above entitled suit.

Witness my hand this ..... day of ..... 19....

.....
Justice of the Peace.

Execution (General Form.)

(264.) ..... of Oklahoma, ... County, ss.

..... of Oklahoma to the sheriff or any constable of said county.

Whereas, on the ..... day of ..... 19...., John Doe recovered judgment against Richard Roe, in the justice court of said county, before A. B., justice of the peace, for ..... dollars, and ..... dollars cost, upon which there is due ..... dollars with interest thereon from ..... 19...., and ..... dollars costs accrued to this time. You are therefore commanded to satisfy said judgment out of the personal property of Richard Roe in your county subject to execution; and have the money in said court to satisfy said judgment, interest, and the accruing costs; and return this execution within thirty days, with your doings thereon.

Judgment $.....
Costs, taxed $.....
Costs, accrued $.....
Interest $.....
Total $.....

Witness my hand at ..... in said county, this ..... day of ..... 19....

.....
Justice of the Peace.

Bill of Sale.

(265.) Know all men by these presents, that I....., of ..... in the county of ..... and ..... of Oklahoma, party of the first part, in consideration of the sum of ..... dollars, to me paid by ....., of ....., party of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, granted, conveyed, and transferred, and by these presents do bargain, sell, grant, convey, transfer and deliver unto the said party of the second part, his executors, administrators and assigns, the following described goods and chattels: (Set out and describe carefully the property). To have and to hold the same, unto the said party of the second part, his executors, administrators and assigns forever. And I do for myself, my heirs, executors, administrators and assigns, warrant my title to said property, and do covenant and agree to and with the said party of the second part, to defend the said described property hereby sold, unto the said party of the second part, his executors, administrators, and assigns, against all and every person whomsoever.

In witness whereof I have hereunto set my hand, the ..... day of ..... 19....

(Signature.)

Signed, sealed and delivered in presence of
(Signature of witnesses.)

Note: To make it a valid sale it should be accompanied by immediate delivery and change of possession.